SUPREME COURT OF THE UNITED STATES

No. 14-510

Title:	Menominee Indian Tribe of Wisconsin, Petitioner v. United States, et al.
Docketed:	November 4, 2014
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Nos.:	(12-5217)
Decision Date:	September 2, 2014

Questions Presented

—Date—	——Proceedings and Orders——
Nov 3 2014	Petition for a writ of certiorari filed. (Response due December 4, 2014)
Dec 8 2014	Order extending time to file response to petition to and including January 5, 2015.
Jan 5 2015	Order further extending time to file response to petition to and including February 4, 2015.
Feb 2 2015	Order further extending time to file response to petition to and including March 6, 2015.
Mar 4 2015	Order further extending time to file response to petition to and including April 6, 2015.
Mar 31 2015	Order further extending time to file response to petition to and including May 12, 2015.
May 8 2015	Order further extending time to file response to petition to and including May 26, 2015
May 26 2015	Brief of respondents United States, et al. filed.
Jun 9 2015	DISTRIBUTED for Conference of June 25, 2015.
Jun 25 2015	DISTRIBUTED for Conference of June 29, 2015.
Jun 30 2015	Petition GRANTED limited to the following question: Whether the D. C. Circuit misapplied this Court's Holland decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?
Jul 29 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 2, 2015.
Jul 29 2015	The time to file respondents' brief on the merits is extended to and including October 21, 2015.
Sep 2 2015	Joint appendix filed (statement of costs filed).
Sep 2 2015	Brief of petitioner Menominee Indian Tribe of Wisconsin filed.
Sep 9 2015	Brief amicus curiae of National Congress of American Indians filed.
Oct 9 2015	SET FOR ARGUMENT on Tuesday, December 1, 2015
Oct 19 2015	Proposal from respondent to lodge copies of claims filed with the Indian Health Service contracting officer and the related decisions of denial at issue in this case.
Oct 19 2015	Record requested from U.S.C.A. District of Columbia Circuit.
Oct 21 2015	Brief of respondents United States, et al. filed.
Oct 27 2015	CIRCULATED

Nov 19 2015	Reply of petitioner Menominee Indian Tribe of Wisconsin filed. (Distributed)
Dec 1 2015	Argued. For petitioner: Geoffrey D. Strommer, Portland, Ore. For respondents: Ilana H.Eisenstein, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jan 25 2016	Adjudged to be AFFIRMED. Alito, J., delivered the opinion for a unanimous Court.
Feb 26 2016	Judgment Issued

14-510

No. 14-____

IN THE

Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

UNITED STATES OF AMERICA;
SECRETARY OF HEALTH AND HUMAN SERVICES;
AND DIRECTOR, INDIAN HEALTH SERVICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Holland v. Florida, 560 U.S. 631, 649 (2010), established that equitable tolling of a non-jurisdictional statute of limitations is warranted where a party shows (1) diligence in pursuing its rights, and (2) that some extraordinary circumstance stood in the way of timely filing. In its decision below, the D.C. Circuit applied the *Holland* test and concluded that the Menominee Indian Tribe did not establish the necessary grounds for obtaining equitable tolling of the statute of limitations for filing claims against the Indian Health Service ("IHS") under the Contract Disputes Act ("CDA") for unpaid contract support costs ("CSC"). As acknowledged in its opinion, the D.C. Circuit's application of *Holland* and its ultimate ruling was in direct conflict with the Federal Circuit's opinion in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) (Pet. App. 75a-97a), which found that the plaintiff tribal organization in that case was entitled to equitable tolling of the CDA statute of limitations under materially similar facts.

The Federal Circuit's opinion and the D.C. Circuit's opinion below are in irreconcilable conflict with one another. Unless and until reconciled by this Court, the conflict will almost certainly undermine fairness and consistency in the administration of justice in the wide array of civil and criminal contexts in which equitable tolling arises. Meanwhile, the D.C. Circuit's decision denies the Menominee Indian Tribe the right to full recovery under its Indian Self-Determination contract based on a narrow and inflexible application of *Holland*, even as other tribes and tribal organizations

may vindicate that right by filing their claims in a different forum. The Tribe therefore seeks this Court's review of the following critical question:

> Whether the D.C. Circuit misapplied this Court's *Holland* decision when it ruled—in direct conflict with a holding of the Federal Circuit on materially similar facts—that the Tribe did not face an "extraordinary circumstance" warranting equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list represents all the parties appearing here and before the United States Court of Appeals for the District of Columbia Circuit:

The Petitioner is the Menominee Indian Tribe of Wisconsin, a federally recognized Indian tribe. The Respondents are the United States of America, the Secretary of Health and Human Services, and the Director, Indian Health Service.

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IN THE

Supreme Court of the United States

No. 14-___

MENOMINEE INDIAN TRIBE OF WISCONSIN,
Petitioner,

v.

UNITED STATES OF AMERICA;
SECRETARY OF HEALTH AND HUMAN SERVICES;
AND DIRECTOR, INDIAN HEALTH SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner the Menominee Tribe of Wisconsin ("Tribe" or "Menominee") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit opinion is reported at 764 F.3d 51 ("*Menominee IV*") (Pet. App 1a-19a). The opinion of the District Court is reported at 841 F. Supp. 2d 99 (D.D.C. 2012) ("*Menominee III*") (Pet. App. 20a-43a).

An earlier decision in this dispute by the D.C. Circuit was reported at 614 F.3d 519 (D.C. Cir. 2010) (*"Menominee II"*). (Pet. App. 44a-68a), *rev'g and remanding Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) (*"Menominee I"*) (Pet. App. 69a-74a).

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. This Petition for Certiorari is being filed within 90 days thereof. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450m-1(d), provides as follows: "The Contract Disputes Act . . . shall apply to self-determination contracts. . . ."

The Contract Disputes Act ("CDA"), 41 U.S.C. § 7103(a)(4)(A),[1] provides as follows: "Each claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim."

STATEMENT

In this case, a panel of the District of Columbia Circuit expressly declined to even consider the first prong of this Court's test in *Holland v. Florida*, 560

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[1] During the years at issue in this appeal, this provision was codified at 41 U.S.C. § 605(a). The CDA has since been revised and renumbered, but the six-year statute of limitations is substantially unchanged. The D.C. Circuit in *Menominee IV* cited to the current codification, 764 F.3d at 55 n.1 (Pet. App. at 3a n.1) so in this petition Menominee will too.

U.S. 631, 649 (2010)[2]—whether the Tribe exercised reasonable diligence—in deciding whether or not the Tribe was entitled to equitable tolling in submitting its contract support costs ("CSC") claims to the IHS for a contracting officer's decision.[3] The court based its holding entirely on the "extraordinary circumstance" prong of the *Holland* test, and adopted a narrow and unreasonably stringent interpretation of that prong to require proof that "external obstacles" prevented timely filing of a claim under the ISDA, to the exclusion of other relevant equitable considerations.

In stark contrast, a panel of the Federal Circuit in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) (Pet. App. 75a-97a) ("*ASNA II*"), reviewing facts similar in all material respects to the facts in this case, held that the plaintiff tribal organization was entitled to equitable tolling. The majority of that panel applied both prongs of the *Holland* test, and, recognizing the "unique facts and extraordinary circumstances" surrounding the drawn-out CSC litigation, held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable

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[2] *Holland* involved application of the Antiterrorism and Effective Death Penalty Act of 1996, not an Indian tribe's claims under the ISDA.

[3] The ISDA, 25 U.S.C. § 450m-1(d), incorporates by reference the provisions of the CDA, 41 U.S.C. §§ 7101 *et seq.*, including § 7103(a)(4), which provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision[,] ... shall be in writing[,] ... [and] shall be the subject of a written decision by the contracting officer. ... Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim."

tolling. 699 F.3d at 1297 (Pet. App. 90a-91a). In its decision below, the D.C. Circuit specifically noted its disagreement with the *ASNA II* majority's analysis and agreed with the *ASNA II* dissent that equitable tolling was unwarranted. *Menominee IV*, 764 F.3d at 60 n.5 (Pet. App. 14a n.5).

In denying Menominee the same relief afforded ASNA by the Federal Circuit, the D.C. Circuit did not point to any factual distinctions, relying instead on its conclusion that the Federal Circuit erred in its application of *Holland*.[4] In fact, the circumstances of ASNA and the Menominee Tribe are similar in all material respects.

- Both ASNA and Menominee asserted claims for breach of contract based on the IHS's policy of systematically underfunding CSC due to its mistaken interpretation of federal appropriations law, a mistake this Court pointed out in *Cherokee Nation of Okla. v. Leavitt*, 543 US. 631 (2005) *("Cherokee")*.
- Both ASNA and Menominee asserted claims for breach of contract for fiscal years 1996, 1997, and 1998.

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[4] The D.C. Circuit referred to *ASNA II* as "a case similar to this one." 764 F.3d at 60 n.5 (Pet. App. 14a n.5). The court also described its difference with the decision in *ASNA II* as based on application of the law, not any material difference in facts, and stated that it agreed with the dissent in *ASNA II*. *Id*. Likewise, the dissent in *ASNA II* cited the similar circumstances in the two cases as a reason for applying the district court's rationale in *Menominee III*, rather than the reasoning of the majority in *ASNA II*. *ASNA II*, 699 F.3d at 1301 n.1 (Pet. App. 96a n.1) (Bryson, dissenting, stating that *Menominee III* involved "a party in essentially the same position as ASNA.").

- Both ASNA's and Menominee's claims were filed with the IHS in September of 2005.
- Both ASNA and Menominee were (and are) members of the *Ramah* class that continues to press claims for unpaid CSC against the Department of the Interior.
- Both ASNA and Menominee received substantial payments associated with earlier settlements in the *Ramah* case.
- Both ASNA and Menominee therefore reasonably relied on analogous CSC class actions against IHS—Menominee on the *Cherokee* case and ASNA on the *Zuni* case.[5]
- Both ASNA and Menominee took "reasonable, diligent, and appropriate action as the legal landscape evolved," *ASNA II*, 699 F.3d at 1297 (Pet. App. 90a), by filing individual claims in September 2005 after this Court's *Cherokee* decision in March, 2005.

Given that these facts are similar in all material respects, there can be no doubt that the D.C. Circuit's decision expressly conflicts with the Federal Circuit's analysis in *ASNA II*.[6] Indeed, the decision creates a conflict between the Circuits that impacts the proper application of equitable tolling under this Court's decision in *Holland* in any number of civil and criminal contexts. This Court's immediate review of the decision below is therefore warranted.

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[5] *See infra*, n.8.

[6] The Federal Government did not seek a writ of certiorari for review of the Federal Circuit's ruling in *ASNA II*.

BACKGROUND

First in 2005 and again in 2012, this Court confirmed the Government's obligation to fully pay CSC owed under its ISDA contracts. *Cherokee*, 543 U.S. 631; *Salazar v. Ramah Navajo Chapter*, __ U.S. __, 132 S. Ct. 2181 (2012) ("*Ramah*"). Following the *Cherokee* decision, the Menominee Tribe filed claims with the IHS for full CSC funding for its contracts covering the calendar years (CY) 1995 through 2004. The agency denied the Tribe's CY 1996 through 1998 claims on the basis that they were barred by the six-year statute of limitations in the CDA. The Tribe appealed the denials directly to the federal district court as permitted by 25 U.S.C. § 450m-1. The district court ruled on summary judgment that the Tribe did not establish facts supporting equitable tolling pursuant to the *Holland* test, 560 U.S. at 649. The D.C. Circuit affirmed. The issue in this appeal is whether the statute of limitations was equitably tolled for the filing of the Menominee Tribe's claims for full CSC funding for CYs 1996 through 1998, while the same issue was being litigated in the *Cherokee Nation* case.

A. The ISDA and Contract Support Costs

The ISDA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). Under Title I of the ISDA, tribes may enter into contracts and annual funding agreements ("AFAs") with the Secretary to assume responsibility to provide contractible programs, functions, services and activities ("PFSAs") that are provided for the benefit of Indian people and that the Secretary would otherwise have administered directly. For many years the

Menominee Tribe, like many tribes, has contracted to operate a comprehensive health services program, including medical, dental, and community health services pursuant to Title I contracts and AFAs.

B. The CSC Litigation History

The CSC litigation and the Tribe's experience in two prior CSC class action cases, the *Ramah* case and the *Cherokee Nation* case, provide the factual basis for equitably tolling the statute of limitations.

In 1993, in a suit filed against the Bureau of Indian Affairs ("BIA") in the United States District Court for the District of New Mexico, the court certified a nationwide class of all tribal contractors who had contracted with BIA. *Menominee IV*, 764 F.3d at 56 (Pet. App. 6a). The case challenged the BIA's policy to deliberately underfund tribal CSC. The Government argued that each class member had to exhaust its administrative remedies by filing claims under the CDA,[7] but the court held that exhaustion would be futile due to the agency's consistent denials of such claims. The court held that "it is not necessary that each member of the proposed class exhaust its administrative remedies," and that all tribal contractors could participate in and benefit from the class action even if they had not gone through the futile process of presenting separate claims. *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM, Order (D.N.M. October 1, 1993). In 1997, the Tenth Circuit ruled in favor of Ramah on liability. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir.

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[7] *See* 41 U.S.C. §§ 7101–7109. *See* 25 U.S.C. § 450m-1(d) (incorporating by reference the CDA as a contract remedy); 25 C.F.R. Part 900, Subpart N.

1997). As a result of settlement in that case, the Menominee Tribe, a member of the *Ramah* class, received nearly $800,000 for claims for 1993 and 1994 (that had not been previously filed). *Menominee IV*, 764 F.3d at 56 (Pet. App. 6a).

The Cherokee Nation filed a separate class action against IHS on March 5, 1999. Both the class and the claims were nearly identical to those in the *Ramah* case, challenging IHS's policy to deliberately underfund CSC. *See Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001) ("*Cherokee Nation*"). Menominee, a longtime contractor with IHS, fit squarely within the *Cherokee Nation* proposed class and as part of the putative class would have been bound by any judgment had the class been certified. *See id.* at 360. Given the Tribe's experience with the *Ramah* class, it relied on the *Cherokee Nation* class action to represent its claims and it did not file its own lawsuit. Decl. of Jerry Wakau at ¶¶ 6-7, *Menominee Indian Tribe of Wis. v. United States*, 841 F.Supp. 2d 99 (D.D.C. 2012) (No. 07-cv-00812) ("Wakau Decl.") (Pet. App. 99a-100a).

In a ruling dated February 9, 2001, the court denied the Cherokee motion for class certification. *Cherokee Nation*, 199 F.R.D. at 366.[8] Four months later, on June 25, 2001, the *Cherokee Nation* court ruled on the merits and found that there was no statutory duty to fully fund CSC under the ISDA. *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248 (E.D. Okla. 2001). The Cherokee Nation appealed the

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[8] After the *Cherokee Nation* court denied class certification in 2001, a second CSC class action was filed by the Pueblo of Zuni. Class certification was denied in that case in 2007. *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007).

substantive ruling to the Tenth Circuit, but did not appeal the denial of class certification, rendering that ruling final. A circuit split developed regarding the viability of CSC claims against the IHS. *Compare Cherokee Nation v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002) (IHS not liable) *with Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1095 (Fed. Cir. 2003) (IHS liable).[9]

As of 2003, then, Menominee faced two conflicting Circuit Court rulings on the extent of the IHS's duty. Given the conflict, and IHS's consistent position interpreting the statute to allow it to fund less than 100% of CSC, it was obvious IHS would deny any claims and therefore futile for the Tribe to file claims. Menominee decided it would be prudent to allow the Supreme Court to resolve the issue before going through the expense of filing claims with the contracting officer. Wakau Decl. at ¶ 8 (Pet. App. 100a).

Once this Court held that the agencies had a duty to fully fund CSC, *Cherokee,* 543 U.S. 631, the Menominee Tribe, like many other putative members of the now uncertified class, sought full funding of CSC as provided for in *Cherokee* by filing individual claims under the CDA.[10] On September 7, 2005, the Tribe filed claims for CSC underpayments in the years 1995

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[9] The Ninth Circuit echoed the Tenth Circuit in ruling that the Government was not liable for CSC shortfalls. *Shoshone-Bannock Tribes v. Sec'y, Dep't of Health and Human Servs.*, 279 F.3d 660 (9th Cir. 2001).

[10] After this Court's decision, the Government indicated it would challenge the *Ramah* precedent and argued that asserted class members must first have presented claims to the contracting officer in order to participate in the class. *See Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006)

through 2004. Assuming the statute was tolled during the pendency of the class action, the Tribe's claims were within the 6-year statute of limitations. The agency denied the claims for CYs 1996 through1998 on the basis that they were barred by the statute of limitations in the CDA.[11] The Tribe appealed the denials directly to the federal district court as permitted by 25 U.S.C. § 450m-1 and (what was then) 41 U.S.C. § 609.

In 2008 the district court below held that the statute of limitations for filing claims under the CDA barred the Tribe's 1996 through1998 funding claims and that the statute is jurisdictional in nature and therefore not subject to tolling. *Menominee I*, 539 F. Supp. 2d at 153–54 (Pet. App. 70a). On appeal, the D.C. Circuit reversed and held that the CDA statute of limitations for filing administrative claims in federal court is not jurisdictional and is thus subject to equitable tolling, and remanded to the district court to determine whether equitable tolling was appropriate. *Menominee II,* 614 F.3d at 529, 531 (Pet. App. 65a, 68a). The court also held that class action tolling under *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 554 (1974), did not apply in this case. *Menominee II*, 614 F. 3d at 527 (Pet. App. 57a).

On remand, the district court ruled on summary judgment that the Tribe did not establish facts supporting equitable tolling pursuant to the test in *Holland*, so the claims were time-barred. *Menominee III*, 841 F. Supp. 2d at 104–09 (Pet. App.

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[11] IHS denied the 1995 claim, which was not barred by the statute of limitations, on the basis of laches. The district court upheld IHS's decision but was reversed on appeal. *Menominee II*, 614 F.3d at 531–32 (D.C. Cir. 2010) (Pet. App. 65a-68a).

28a-37a). On appeal, the D.C. Circuit affirmed. *Menominee IV*, 764 F.3d 51 (Pet. App. 19a).

REASONS FOR GRANTING THE PETITION

The D.C. Circuit erred in ruling that the filing deadline for the Menominee Tribe's claims was not tolled for the period the Tribe was a putative member of the *Cherokee Nation* class. The D.C. Circuit misapplied the equitable tolling doctrine by adopting a narrow test inconsistent with the flexible analysis mandated by this Court in *Holland*.[12] In *ASNA II* the Federal Circuit recognized that the CSC litigation created "unique facts and extraordinary circumstances" and held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable tolling. 699 F.3d at 1297 (Pet. App. 90a-91a).

Sharply breaking from the Federal Circuit's reasoning, the D.C. Circuit ruled on materially similar facts in this case that equitable tolling

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[12] In *Holland*, this Court made clear that the exercise of equitable powers must be made flexibly on a "case-by-case basis," rather than according to "mechanical rules." *Holland*, 560 U.S. at 649-50. Equitable doctrines "relieve hardships" imposed by "hard and fast adherence" to absolute legal rules. *Id.* at 650. "The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . particular injustices." *Id.* (citations and internal quotation marks omitted). Courts exercising equitable powers "draw upon decisions made in other similar cases for guidance" and with an awareness "that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* Moreover, "[t]he diligence required for equitable tolling purposes is '*reasonable* diligence,' not 'maximum feasible diligence.'" *Id.* at 653 (internal quotations and citations omitted) (emphasis added).

was unwarranted for lack of "extraordinary circumstance." 764 F.3d at 60 n.5 (Pet. App. 14a n.5). The two decisions are in irreconcilable conflict, and the D.C. Circuit's decision imposes an inequitable result on the Tribe. Moreover, the D.C. Circuit's misapplication of the *Holland* test and the conflicting approaches to equitable tolling taken by the two Circuits will likely result in inconsistent and improper application of that doctrine in other civil and criminal contexts, well beyond the ISDA and the CDA.

I. REVIEW IS WARRANTED BECAUSE AN ACKNOWLEDGED CIRCUIT SPLIT EXISTS ON THE INTERPRETATION AND APPLICATION OF *HOLLAND* TO MATERIALLY SIMILAR FACTS.

The Federal and D.C. Circuits' conflicting decisions, ruling on materially similar facts involving tribal claims for withheld CSC funding,[13] result in diametrically opposed precedents for application of equitable tolling. The radical difference in the courts' analyses and application of the *Holland* test is expressly acknowledged in the opinions.

In *ASNA II* the Federal Circuit held that ASNA was entitled to equitable tolling based on facts that are essentially the same as those in Menominee's case, and in doing so expressly declined to follow the reasoning employed by the district court in *Menominee III*, which was decided during briefing in *ASNA II*. *See ASNA II*, 699 F.3d at 1296 n.4 (Pet. App. 87a n.4).[14]

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[13] *See* discussion *supra* at pp.4-5.

[14] The *Menominee* and *ASNA* cases were intertwined in prior proceedings. In *Menominee II*, the D.C. Circuit held that equitable tolling applies, noting agreement with the Federal Circuit's identical ruling in *Arctic Slope Native Ass'n v. Sebelius*,

The majority in *ASNA II* found that both *Holland* prongs were satisfied in its analysis, i.e. (1) that the claimant exercised due diligence, and (2) that there were extraordinary circumstances. The court found that the CSC litigation landscape represented "unique facts and extraordinary circumstances," and held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable tolling. 699 F.3d at 1297.

The Federal Circuit addressed ASNA's reliance on putative membership in class action proceedings and rejected the Government's argument that the tribal organization should have taken affirmative action to file claims. The Federal Circuit's conclusion applies as well to Menominee as to ASNA:

> Monitoring and reasonably interpreting applicable legal proceedings, judicial order and opinions, and taking action as necessary does not constitute sleeping on one's rights, particularly in the class action context where parties who believe they are putative class members often remain passive during the early stages of the litigation allowing the named class representatives to press their claims.

ASNA II, 699 F.3d at 1297 (Pet. App. 88a – 89a).

The Federal Circuit also found that tolling the limitations period was "not fundamentally unfair" to the Government, and that in this case the analysis should take into account the trust responsibility of the United States toward Indian tribes. *Id.* at 1297–98 (Pet. App. 90a-91a).

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583 F.3d 785, 798–99 (Fed. Cir. 2009) ("*ASNA I*"). *See Menominee II*, 614 F.3d at 530–31 (Pet. App. 49a).

The D.C. Circuit used a radically different analysis in *Menominee IV*. First, the panel expressly declined to even consider the first prong of the *Holland* test, whether the Tribe exercised reasonable diligence. 764 F.3d at 59 n.4 (Pet. App. 12a n.4). Second, the panel adopted a narrow and stringent interpretation of the "extraordinary circumstance" prong of the *Holland* test to require proof that "external obstacles" prevented timely filing of a claim. *Id.* at 62 (Pet. App. 18a). Third, the D.C. Circuit ignored other factors relevant to the equitable analysis, such as prejudice to the Government and the Tribe's trust relationship with the United States, *id.* at 59 n.4 (Pet. App. 12a n.4), factors that were included in the Federal Circuit's analysis.

The circuit split created by the different approach in these decisions threatens the fair and consistent administration of justice in the wide variety of contexts in which equitable tolling arises—well beyond the context of the ISDA or the CDA. *Holland* itself concerned tolling of the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d), applying a 1-year statute of limitations on applications for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. *Holland*, 560 U.S. at 634. *Holland* is also regularly applied with regard to the statute of limitations under 28 U.S.C. § 2255, the counterpart to § 2244 for prisoners in federal custody. *See, e.g.*, *United States v. Terrell*, 405 F. App'x 731, 732 (4th Cir. 2010). Federal courts also routinely apply *Holland* to determine whether circumstances warrant tolling of time limitations set in a wide range of civil statutes, impacting an array of claims against the United States as well as State and private

defendants.[15] Guidance is needed from this Court to resolve the conflict and confusion, made starkly apparent in this case, over the application of *Holland* to prevent inconsistent application of equitable tolling in all of these contexts.

II. THE D.C. CIRCUIT MISAPPLIED *HOLLAND*.

A. The D.C. Circuit failed to apply the diligence prong of *Holland*.

Equitable tolling requires both diligence *and* extraordinary circumstances. *Holland*, 560 U.S. at 649 (internal quotations omitted). The D.C. Circuit erred by declining to evaluate whether the Tribe exercised reasonable diligence. The two prongs of the *Holland* test are not discrete, mutually exclusive factors to be applied separately. The equitable doctrine embodied in *Holland* provides the inherent "flexibility" adequate to enable a court "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id.* at 650 (citations and internal

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[15] *See, e.g.*, *Wohlwend v. Shinseki*, 549 Fed. Appx. 1015 (Fed. Cir. 2013) (remanding to Veterans Court for reconsideration of equitable tolling of limitations period in 38 U.S.C. § 7266 pursuant to *Holland*); *Billups v. Scholl*, No. 2:13-cv-258, 2014 U.S. Dist. LEXIS 137338 (S.D. Ohio Sept. 29, 2014) (tolling deadline for effecting service in action pursuant to 42 U.S.C. § 1983); *Bergman v. Kindred Healthcare, Inc.*, 949 F Supp. 2d 852, 860 (N.D. Ill. 2013) (tolling statute of limitations under Fair Labor Standards Act); *Hogan v. Northwest Airlines, Inc.*, No. 11-cv-14888, 2013 U.S. Dist. LEXIS 21962 (E.D. Mich. Feb. 19, 2013) (failure to timely meet presentment deadlines under Federal Tort Claims Act); *Flores v. Predco Servs. Corp.*, 911 F. Supp. 2d 285 (D.N.J. 2012) (applying *Holland* to statute of limitations in personal injury action against private defendant).

quotation marks omitted). In order for a court to achieve that result the two prongs must be considered in light of the relation they bear to each other and to other equitable factors. The exercise of equitable powers on a "case-by-case basis" makes sense only if the hardship imposed by the circumstance is judged in light of the reasonableness and diligence of action taken in light of the circumstance. Likewise, a party's diligence is in part measured by the nature of the circumstances that stood in the way of timely filing.

This Court's analysis in *Holland* demonstrates the wisdom of the unitary nature of the rule and offers an excellent example of its application. In *Holland*, the district court denied equitable tolling based on lack of diligence, while the circuit court denied tolling based on a conclusion that the petitioner failed to demonstrate that "extraordinary circumstances" prevented timely filing. This Court reversed and remanded for the equitable "fact-intensive" inquiry necessary to determine whether the petitioner had met the burden to establish *both* elements for equitable tolling. 560 U.S. at 653-54. The Court also evaluated both elements of the test in *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

The D.C. Circuit does not explain or provide a rationale for divorcing a consideration of reasonable diligence from its analysis of extraordinary circumstances, even though the two D.C. Circuit cases cited in the opinion involved decisions where both prongs were evaluated in determining whether equitable tolling was warranted. *See Dyson v. District of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013) ("The District Court concluded that Appellant neither pursued her rights diligently nor proved that an extraordinary circumstance stood in her way."));

Commc'ns Vending Corp. of Ariz. v. FCC, 365 F.3d 1064, 1075 (D.C. Cir. 2004). *See Menominee IV*, 764 F. 3d at 58, 61 (Pet. App. 10a, 16a). Other cases cited by the D.C. Circuit also refer to both reasonable diligence and extraordinary circumstances as necessary aspects of one "extraordinary circumstances test." *See Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750 (6th Cir. 2011) (discussing post-*Holland* law as comprising "the 'extraordinary circumstances' test, which requires *both* reasonable diligence and an extraordinary circumstance") (citations omitted and emphasis added); *Manning v. Epps*, 688 F.3d 177, 184 n.2 (5th Cir. 2012) (same); *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir. 2006) (same); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (test evaluates "extraordinary circumstances that are both beyond [the party's] control and unavoidable even with diligence"); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (citing *Sandvik*).

To the contrary, the D.C. Circuit declined to consider whether the Tribe exercised diligence, and thus did not evaluate whether the Tribe's response to the CSC litigation landscape was reasonable. The court is simply wrong to suggest that the prongs are mutually exclusive, or that the Federal Circuit in *ASNA II* failed to "separately" address the two *Holland* prongs. *See Menominee IV*, 764 F.3d at 60 n.5 (Pet. App. 14a n.5). In fact, what the Federal Circuit's careful analysis shows is that reasonable diligence can only be evaluated, and in fact only makes sense, when considered in the context of the factors and variables that constitute the "extraordinary circumstances" governing the CSC litigation.

B. The D.C. Circuit misapplied the "extraordinary circumstance" prong to require proof that an "external obstacle" affirmatively prevented filing.

The D.C. Circuit misinterpreted the "extraordinary circumstance" prong of the *Holland* test. Rather than consider the totality of the circumstances beyond the Tribe's control, as the Federal Circuit did—for example, the history of CSC litigation created by other tribes and the U.S.—the D.C. Circuit analyzed each discrete element of the complex and protracted CSC litigation separately to determine whether it amounted to an "external obstacle" that, by itself, "prevented" the Tribe from timely filing. *E.g.*, 764 F.3d at 59, 62 (Pet. App. 12a, 18a).

The court does not cite any case employing or applying the term "external obstacle."[16] The court offers no clue about what the test means and provides no explanation, description, or example of what constitutes an obstacle, or any circumstance which, in its view, would rise to the level of an "external obstacle" warranting equitable tolling. Some cases cited by the court refer to "external factors" or circumstances "external" to the party claiming equitable tolling. In *In re Wilson*, the court noted that "failure to satisfy the statute of limitations must result from external

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[16] The only two D.C. Circuit cases cited by the court do not use the term. *See Dyson*, 710 F.3d at 422 (describing equitable tolling as a doctrine "meant to ensure that the plaintiff is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit") (brackets and internal quotation marks omitted); *Commc'ns Vending Corp. of Ariz.*, 365 F.3d at 1075 (equitable tolling ensures that a party "is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit") (citations omitted).

factors beyond [the party's] control." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006), *citing Felder v. Johnson*, 204 F.3d 168, 174 (5th Cir. 2000) ("Equitable tolling is appropriate when an extraordinary factor beyond the plaintiff's control prevents his filing on time.").[17] However, the fact that a circumstance is an "external factor" does not mean it is necessarily an "external obstacle," a term that offers no practically useful principle of interpretation and is, in fact, impossible to reconcile with the equitable purpose of the *Holland* test and with the *Holland* Court's weighing of all equitable factors, including non-external factors. As applied by the court in this case, the limiting rule requiring evidence of an "external obstacle" amounts to the rigid *per se* approach rejected by this Court in *Holland*, 560 U.S. at 650-51. In *Holland* this Court required a "fact-intensive" inquiry into both elements against a backdrop of all factors affecting the equities. *Id.* at 653-54.

In *ASNA II* the Federal Circuit performed the same type of analysis of both *Holland* prongs, finding cumulative import in the combination of several external factors that affected timely filing of ASNA's claims: reliance on the filing of the *Cherokee Nation* CSC class action; successful past experience in a similar CSC class action; unsettled case-law; lack of prejudice to the Government; and the Government's unique trust obligation. Framed by the unique history, breadth and complexity of the CSC litigation

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[17] *See also Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("circumstances external to the party's own conduct"); *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (circumstances beyond a party's control or "external to his own conduct").

itself, the Federal Circuit found these factors constituted the extraordinary circumstances necessary to invoke application of equitable tolling.

The D.C. Circuit, on the other hand, miscalculated the true nature of the CSC litigation by applying an impractical and inexplicable requirement that some single "external obstacle" stood in the way of timely filing. As a result, the court failed to appreciate or even evaluate the Tribe's reasonable diligence – its deliberate, pragmatic and efficient response consistent with the true nature of the proceedings and judicial order. *See ASNA II*, 699 F.3d at 1297 (Pet. App. 88a). Nor did the D.C. Circuit analyze the factor of fiduciary duty to Indian tribes, which, while not conclusive to the analysis, should be entitled to some weight. Similarly, the prejudice to the Government in having to pay what it agreed to pay for the Tribe to provide health services to IHS beneficiaries—services the Government would have paid for directly but for the ISDA contract—does not seem significant.

In applying *Holland*, the court dismissed the Tribe's reliance on the *Cherokee Nation* class action as a basis for its decision to delay filing an administrative claim. The Tribe had participated in the earlier *Ramah* class action and received settlement payments without filing administrative claims. When the Cherokee Nation filed an analogous class action against IHS, the Tribe relied on that precedent and did not file individual claims while the *Cherokee Nation* case proceeded through the courts. The court of appeals acknowledged that the *Cherokee Nation* claims were "legally analogous" to the *Ramah* claims, 764 F.3d at 56 (Pet. App. 14a n.6), and that the *Cherokee Nation* suit "defined the proposed class in a manner that clearly included the Menominee

Tribe." *Id.* It is true that the *Cherokee Nation* class action did not pose an affirmative "obstacle" to Menominee filing individual claims, but the class action was certainly a key part of the "then-existing legal landscape" that the Federal Circuit found "constituted an 'extraordinary circumstance' sufficient to warrant equitable tolling of the filing deadline." *ASNA II*, 699 F.3d at 1296 (Pet. App. 87a).

The D.C. Circuit also rejected the Tribe's argument that conflicting precedent contributed to the "extraordinary circumstances" justifying application of equitable tolling. Again the court analyzed this factor in isolation, and determined it did not rise to the level of an "external obstacle" that independently "prevented" the Tribe from filing. 764 F.3d at 61-62 (Pet. App. 17a-18a). The court stated the Tribe could have filed claims with "little more than an envelope and a stamp," and then appealed the inevitable IHS denials by filing suit in "another circuit" which had not yet ruled in favor of the IHS. *Id.* at 61 (Pet. App. 16a-17a). But the fact that no "external obstacle" actively prevented the Tribe from filing claims does not mean that its decision to conserve scarce tribal resources by avoiding litigation (and forum-shopping), while monitoring the *Cherokee Nation* case, disqualified the Tribe from equitable tolling. On the contrary, under similar circumstances, the Federal Circuit found that ASNA "monitor[ed] and reasonably interpret[ed] applicable legal proceedings, judicial order and opinions," recognized that the CSC litigation represented "unique facts and extraordinary circumstances," and held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable tolling. 699 F.3d at 1297 (Pet. App. 88a-91a).

The D.C. Circuit acknowledged cases cited by the Tribe which recognize that lack of clear precedent may contribute to extraordinary circumstances for purposes of equitable tolling, but construed those cases narrowly, recognizing only "binding precedent" as sufficient to constitute an extraordinary circumstance. *Menominee IV*, 764 F.3d at 62 (Pet. App. 17a-18a). at 62. In fact, the cases speak more directly to the Tribe's situation than the court of appeals admitted. In *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008), the statute was equitably tolled where petitioner relied on circuit court precedent later overruled by the Supreme Court. In *Capital Tracing v. United States*, 63 F.3d 859, 862 (9th Cir. 1995), lack of clear precedent on an issue constituted an equitable factor in tolling. And *Communications Vending*, 365 F.3d at 1075, the case cited by the court of appeals for the argument that "uncertainties of controlling law" do not suspend limitations, involved challenges to various claims pending before the agency, not claims that had been adjudicated in litigation with established court precedent, such as the clear and conflicting precedent that existed in this case regarding the agencies' CSC obligation.[18]

The Federal Circuit's parallel decision in *ASNA II*, finding that equitable tolling applied in analogous

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[18] Claims may also be deemed tolled until a "modifying decision" has been made. *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 62 (Fed. Cl. 2009). *See also United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972) (claim accrues when plaintiff has a right to enforce his cause); *United States v. Le Patourel*, 593 F.2d 827, 830–31 (8th Cir. 1979) (claim accrued when right clarified).

circumstances, represents a nuanced and appropriate application of the *Holland* test, responsive to equity's purposes and to the "particular injustices" represented in the Government's longstanding resistance to providing full CSC funding. The Menominee Tribe is entitled to an identical ruling in this case, and resolution of this conflict is essential to the consistent administration of justice wherever the question of equitable tolling arises. *See Holland*, 560 U.S. at 655 (Alito, J., concurring) (noting that the "extraordinary circumstance" requirement is a "conclusory formulation" that "does not provide much guidance to lower courts charged with reviewing many habeas petitions filed every year" and noting that the majority opinion in *Holland* offered little explanation of the correct standard.)

CONCLUSION

This case involves "particular injustices" associated with the long-running CSC litigation, the type and character of injustice that the exercise of equitable powers under *Holland* is intended to correct. *See Holland*, 560 U.S. at 650. This is not a case where different facts determined different outcomes. The courts recognized that the determining facts are essentially the same,[19] but applied different tests for equitable tolling under *Holland*. The Federal Circuit found cumulative import in the combination of a tribal

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[19] Notably, the dissent in *ASNA II* cited the identical circumstances in the two cases as a reason for applying the district court's rationale in *Menominee III*, rather than the reasoning of the majority in *ASNA II*. *See ASNA II*, 699 F.3d at 1300 n.1 (Pet. App. 96a n.1) (Bryson, C., dissenting) (*Menominee III* involved "a party in essentially the same position as ASNA").

organization's reliance on the filing of the *Cherokee Nation* CSC class action; successful past experience as a putative member in another CSC class action; unsettled case-law regarding the Government's obligation to fund CSC; lack of prejudice to the Government; and the Government's unique trust obligation to tribes. The Federal Circuit found that these factors, framed by the unique history, breadth and complexity of the CSC litigation itself, constituted the extraordinary circumstances necessary to invoke application of equitable tolling, and that ASNA's reliance on prior experience in class actions represented reasonable diligence. Unlike the Federal Circuit, the D.C. Circuit characterized these factors, separately and in combination as part of the CSC litigation history, as "garden variety" in nature and explained the Tribe's lack of timely filing as the result of simple "legal misunderstandings and tactical mistakes," thus not amounting to extraordinary circumstances justifying equitable tolling. 764 F.3d at 54, 59-60 (Pet. App. 2a, 11a).

However, "similar cases"—in this instance, essentially the same cases—should be determined on the basis of consistent analysis. The D.C. Circuit's decision, which directly rejected the Federal Circuit's analysis, creates a conflict among the circuits with respect to the formulation and application of the *Holland* test and accordingly presents a critically important issue for this Court's review. Moreover, the D.C. Circuit's decision fails because it does not analyze all the relevant factors as does the *Holland* decision, and as does the Federal Circuit in following the *Holland* decision. Finally, the decision creates a clear conflict between the circuits that has a high likelihood of impacting the proper application of equitable tolling under this Court's decision in *Holland* in any number of civil and criminal contexts.

The Menominee Tribe respectfully requests that its petition for writ of certiorari be granted so that this Court can resolve the irreconcilable differences between the two circuit courts of appeals in interpreting and applying the *Holland* test for determining when equitable tolling is warranted.

Respectfully submitted,

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November 3, 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

No. 12–5217.

MENOMINEE INDIAN TRIBE OF WISCONSIN,
Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

Argued March 13, 2014.
Decided Sept. 2, 2014.

Before GARLAND, *Chief Judge*, and TATEL and PILLARD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*:

Federal law requires that a claim for breach of a self determination contract between an Indian Tribe and a federal agency be filed with a contracting officer at the agency within six years of the claim's accrual. The Menominee Indian Tribe of Wisconsin filed claims in 2005 against the Department of Health and Human Services for unpaid contract support costs that accrued from 1996 through 1998—more than six years earlier. This case requires us to determine whether, pursuant to the doctrine of equitable tolling, the Tribe may sue even though the statute of limitations has

lapsed. Equitable tolling is only available to a party who can show, *inter alia*, that "'some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)). The Menominee Tribe identifies two circumstances that it suggests are "extraordinary" under *Holland*. First, the Tribe contends that it did not file timely claims because it believed that, as a member of a federal class action filed by another tribe, it was entitled to a different form of tolling—class-action tolling—that it believed afforded it two additional years beyond the statutory limitations period. Second, the Menominee Tribe contends that adverse legal precedent (which has since been reversed) led it to believe during the limitations period that its claims had no hope of success, so the Tribe refrained from the apparently futile act of filing them. We conclude that the legal misunderstandings and tactical mistakes the Tribe has identified here, however, do not amount to "extraordinary circumstance[s]" justifying equitable tolling. The Menominee Tribe's claims are thus barred by the statute of limitations.

I.

Between 1995 and 2004, the Menominee Indian Tribe of Wisconsin ("the Menominee Tribe" or "the Tribe") provided healthcare services to its members pursuant to a self determination contract with the Secretary of Health and Human Services (HHS). *Menominee Indian Tribe of Wis. v. United States (Menominee I)*, 539 F.Supp.2d 152, 153 (D.D.C.2008). The Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq*. (2012) ("ISDA"

or the "Act"), authorizes such con-tracts to encourage tribal participation in, and man-agement of, programs that would otherwise be ad-ministered on Indian Tribes' behalf by the Depart-ment of the Interior and HHS. *See id.* §§ 450a, 450f. The Act requires the Secretary of the Interior and the Secretary of HHS to turn over direct operation of certain federal Indian programs to any Indian tribe that wishes to run those programs itself. *See id.* § 450f(a); *see also id.* § 450a(b). A "self determination contract" is the vehicle for transferring those pro-grams. *Id.* § 450b(j).

Pursuant to a self determination contract, the government agrees to pay a participating tribe what it would have cost the federal agency to provide the services had the agency implemented the program itself. *See id.* § 450j–1(a)(1). Since 1988, the Act has also required that tribal contractors be reimbursed for "contract support costs"—additional reasonable overhead and other specified indirect costs that tribes incur. *Id.* § 450j–1(a)(2), (3); *see generally* ISDA Amendments of 1988, Pub.L. No. 100–472, § 201, 102 Stat. 2285 ("1988 Amendments"); S.Rep. No. 100–274, at 8–13, 2627–32 (1987). Tribes and the government negotiate the services and the attendant contract support costs through annual funding agreements, which become part of their self determination contracts. *See* 25 U.S.C. § 450 l (c).

Parallel but mutually exclusive paths for resolving disputes relating to self determination contracts are set forth in overlapping provisions of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109,[1] and the

[1] The CDA was codified at 41 U.S.C. §§ 601–13 during the years at issue in this case. The CDA has since been recodified and

ISDA, 25 U.S.C. § 450m–1(a), (d). Pursuant to the CDA, a contractor, such as an Indian tribe seeking underpaid contract support costs, must make a claim in writing to a contracting officer at the relevant agency before it may sue in court. *See* 41 U.S.C. § 7103(a). The demand need not be detailed, and may consist of a short written statement outlining the basis of the claim, estimating damages, and requesting a final decision. *See M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed.Cir.2010); *see also Arctic Slope Native Ass'n v. Sebelius (Arctic Slope I)*, 583 F.3d 785, 797 (Fed.Cir.2009) ("[S]ubmissions to the contracting officer need not be elaborate."). If the contracting officer denies the claim, the tribe may then follow one of two paths: (1) under the CDA, the tribe may appeal administratively within the agency or directly to the Court of Federal Claims, and then to the Court of Appeals for the Federal Circuit, 41 U.S.C. § 7104(a), (b)(1); or (2) under the ISDA, file a claim in any federal district court with jurisdiction over the relevant agency, 25 U.S.C. § 450m–1(a). *See Menominee Indian Tribe of Wisconsin v. United States (Menominee II)*, 614 F.3d 519, 521–22 (D.C.Cir.2010).[2] Since 1994, the CDA has also required that all claims related to government contracts be submitted to a contracting officer within six years of the accrual of the claim. *Arctic Slope Native Ass'n, Ltd. v. Sebelius (Arctic Slope II)*, 699 F.3d 1289, 1295 (Fed.Cir.2012); *Menominee II*, 614 F.3d at 521.

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renumbered. *See* 41 U.S.C. §§ 7101–09. In this opinion, we will cite to the current codification.

[2] Both paths require that a party submit a claim to a contracting officer at the relevant agency before taking further steps. *See* 41 U.S.C. § 7103(a); 25 U.S.C. § 450m–1(d) (incorporating the CDA's procedural requirements into the ISDA).

The ISDA requires self determination contracts to contain what has proven to be a contentious proviso: that full payment of contract support costs is "subject to the availability of appropriations." 25 U.S.C. § 450j–1(b); *see also Salazar v. Ramah Navajo Chapter*, —— U.S. ——, 132 S.Ct. 2181, 2187, 183 L.Ed.2d 186 (2012). Tribes and federal agencies have disputed the meaning of that phrase for more than 20 years. Throughout the 1990s, the Departments of Interior and HHS, the two principal agencies that enter self determination contracts with Tribes that include contract support costs, read that phrase as authorizing them to pay less than the full amount of a tribe's contract support costs even when Congress had appropriated enough unrestricted funds to the agencies to fully cover those costs. *See Salazar*, 132 S.Ct. at 2187–89; U.S. Gov't Accountability Office, GAO/RCED–99–150, Indian Self–Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed 3–4, 32–33 (1999). As a result of pervasive reimbursement short-falls, tribes cut ISDA services to tribal members, diverted resources from non-ISDA programs, and even forwent certain contract opportunities, hindering their progress toward self determination. U.S. Gov't Accountability Office, *supra*, at 3–4.

Tribes also began to pursue individual and collective legal claims against the federal government seeking recovery of unpaid contract support costs. *See, e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005); *Shoshone–Bannock Tribes of Fort Hall Reservation v. Sec'y, Dep't of Health & Human Servs.*, 279 F.3d 660 (9th Cir.2002); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed.Cir.1999); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir.1997); *Ramah Navajo Sch.*

Bd., Inc. v. Babbitt, 87 F.3d 1338 (D.C.Cir.1996). The Menominee Tribe, however, neither filed claims with the agencies nor filed suit. It instead relied on two nationwide class actions brought by other tribes that it thought might vindicate its rights, and did not pursue its own claims more aggressively because the HHS's Indian Health Service's (IHS) consistent pattern of refusals to pay such claims led the Tribe to conclude that any such claims would be futile.

The first of two tribal class actions brought the Menominee Tribe some relief on claims that are distinct from but legally analogous to the claims at issue here, and made the Tribe somewhat complacent about these claims. That case, brought by the Ramah Navajo Chapter, sought reimbursement of contract support costs from the Secretary of the Interior and its Bureau of Indian Affairs (BIA). *See Ramah Navajo Chapter*, 112 F.3d at 1458–59, 1461. The district court in *Ramah* certified a nationwide class of all tribal contractors, even those who had not exhausted their administrative remedies under the CDA, on the ground that the case challenged the legality of the BIA's system-wide policies and practices, not the adequacy of its performance under specific contracts. Appellant Br. add. at 5a–6a (*Ramah Navajo Chapter v. Lujan*, No. CIV 90–0957 LH/RWM, Order (D.N.M. October 1, 1993)). The Menominee Tribe was a member of that class, and when the case settled, the Tribe received nearly $800,000 in compensation for BIA underpayments and equitable relief related to future BIA contract support cost payments. App. at 55, 63.

The Menominee Tribe did not fare as well in the second class action, which sought recovery from the IHS of some of the costs that are at issue here. In 1999, the Cherokee Nation sued the Secretary of HHS on

behalf of all tribal contractors, claiming that IHS had underfunded tribes' contract support costs from 1988 to the present. The suit defined the proposed class in a manner that clearly included the Menominee Tribe. *See Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D.Okla.2001). Given the Tribe's experience with the *Ramah* class, it relied on the *Cherokee Nation* class action to represent it, and did not file its own claims with IHS administratively. The district court in *Cherokee Nation*, however, denied class certification on the ground that the class lacked commonality, typicality, and adequate representation. *Id.* at 363–66. Five months later, the district court denied the Cherokee Nation's claim on the merits. *Cherokee Nation of Okla. v. United States*, 190 F.Supp.2d 1248, 1259–61 (E.D.Okla.2001). The Cherokee Nation appealed the merits decision but not the denial of class certifica-tion, and the Tenth Circuit affirmed. *See Cherokee Nation of Oklahoma v. United States*, 311 F.3d 1054, 1063 (10th Cir.2002).

While that lawsuit was pending, the Cherokee Nation also pursued identical contract support costs claims against the IHS for different years through the second route provided by the CDA—an administrative proceeding before the Interior Board of Contract Appeals (IBCA).[3] The Board ruled in favor of the Cherokee Nation, *In re Cherokee Nation of Okla.*, IBCA Nos. 3877–79, 99–2 B.C.A. (CCH) ¶ 30,462, 1999 WL 440045 (I.B.C.A.1999), and the Federal Circuit affirmed, *Thompson v. Cherokee Nation of Okla.*, 334

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[3] The Cherokee Nation's claims against IHS—a service within HHS, not Interior—were before the IBCA because the ISDA provides that "all administrative appeals relating to [self determination] contracts shall be heard by the Interior Board of Contract Appeals." 25 U.S.C. § 450m–1(d).

F.3d 1075, 1079 (Fed.Cir.2003). That decision created a circuit split with the Tenth Circuit's *Cherokee Nation* decision and with a Ninth Circuit decision that had denied another tribe's claims for contract support costs. *See Cherokee Nation of Oklahoma*, 311 F.3d at 1063; *Shoshone-Bannock Tribes*, 279 F.3d at 663. The Supreme Court granted certiorari in the two *Cherokee Nation* cases to resolve the circuit split. *See Cherokee Nation*, 543 U.S. at 635–36, 125 S.Ct. 1172. The Court held in the consolidated cases that, when Congress has appropriated sufficient unrestricted funds to pay a tribe's contract support costs, the government cannot avoid its contractual obligation to pay those costs on grounds of "insufficient appropriations." *Id.* at 636–38, 125 S.Ct. 1172.

On September 7, 2005, six months after the Cherokee Nation's victory in the Supreme Court, the Menominee Tribe filed administrative claims with a contracting officer at the IHS to recover contract support costs for the years from 1995 through 2004. *Menominee Indian Tribe of Wis. v. United States (Menominee III)*, 841 F.Supp.2d 99, 101–02, 106 (D.D.C.2012). The contracting officer denied the claims from 1996 through 1998 as untimely. Appellant Br. at 4.

The Menominee Tribe challenged that decision in federal district court, arguing that the statute of limitations should have been tolled. *See Menominee I*, 539 F.Supp.2d at 154 n. 2. The Tribe contended that, from March 5, 1999, the date the *Cherokee Nation* class action was filed, to February 9, 2001, the date the district court in that case denied class certification—a period just shy of two years—the statute of limitations governing the Tribe's claims for 1996, 1997, and 1998 should have been tolled pursuant to the doctrine of

class-action tolling. *See* Pls.' Mem. in Opp'n at 30–35, *Menominee I*, 539 F.Supp.2d 152 (No. 07–812). The Tribe argued that its claims for the years between 1996 through 1998 accrued when its self determination contract expired in 1998, and therefore all would have been timely had the limitations period been tolled for two years during the pendency of the *Cherokee Nation* motion for class certification. *Id.* at 33. In the alternative, the Tribe argued that its claims were eligible for equitable tolling. *Id.* at 35–41.

The district court rejected the Tribe's class-action and equitable tolling arguments in a footnote, *Menominee I*, 539 F.Supp.2d at 154 n. 2, affirming the contracting officer's denial of the Menominee Tribe's claims. That court held that the statute of limitations for such claims is jurisdictional and thus categorically ineligible for tolling. *Id.* An earlier panel of this court reversed in part, agreeing that the Tribe was ineligible for class-action tolling, but holding that the statute of limitations in the CDA may be subject to equitable tolling. *Menominee II*, 614 F.3d at 529. We remanded to the district court "to determine whether tolling is appropriate under the circumstances of this case." *Id.* at 531. On remand, the district court held that the Tribe's failure to timely file its claims was not one of the "extraordinary and carefully circumscribed instances" justifying the exercise of the "court's equitable power to toll the statute of limitations." *Menominee III*, 841 F.Supp.2d at 105 (quoting *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1057 (D.C.Cir.1988)). This appeal followed.

II.

The parties disagree about the appropriate standard of review. The Menominee Tribe argues that our review is de novo. The government contends that abuse of discretion is the proper standard. We need not resolve that question, however, because, even applying non-deferential de novo review to the adverse ruling of the district court, we find that the circumstances of this case do not justify equitable tolling.

Equitable tolling is available to a party "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649, 130 S.Ct. 2549 (quoting *Pace*, 544 U.S. at 418, 125 S.Ct. 1807). The Supreme Court has emphasized that equitable tolling must be applied flexibly, case by case, without retreating to "mechanical rules" or "archaic rigidity." *Id.* at 649–50, 130 S.Ct. 2549 (internal quotation marks omitted). *Holland* also emphasizes that courts must keep in view equity's purposes: correcting particular injustices and "reliev[ing] hardships 'which, from time to time, arise from a hard and fast adherence' to more absolute legal rules." *Id.* (quoting *Hazel–Atlas Glass Co. v. Hartford–Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)).

To count as sufficiently "extraordinary" to support equitable tolling, the circumstances that caused a litigant's delay must have been beyond its control. *See Dyson v. District of Columbia*, 710 F.3d 415, 422 (D.C.Cir.2013) (describing equitable tolling as a doctrine "meant to ensure that the plaintiff is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit" (brackets and

internal quotation marks omitted)); *see also*, *e.g.*, *In re Wilson*, 442 F.3d 872, 875 (5th Cir.2006) (per curiam); *Graham–Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560–61 (6th Cir.2000); *Harris v. Hutchinson*, 209 F.3d 325, 330–31 (4th Cir.2000); *Sandvik v. United States*, 177 F.3d 1269, 1271–72 (11th Cir.1999). The circumstance that stood in a litigant's way cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation. When a deadline is missed as a result of a "garden variety claim of excusable neglect" or a "simple miscalculation," equitable tolling is not justified. *Holland*, 560 U.S. at 651, 130 S.Ct. 2549 (internal quotation marks omitted); *see Griffith v. Rednour*, 614 F.3d 328, 331 (7th Cir.2010) (no tolling for a "simple legal mistake"); *Cross–Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir.2003) (no tolling for "lack of legal knowledge or legal resources"); *David v. Hall*, 318 F.3d 343, 346 (1st Cir.2003) (no tolling for "routine error" and "carelessness"); *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.2001) (no tolling for "miscalculation[s]" and "inadequate research"); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000) (no tolling for "miscalculation or misinterpretation"); *Harris*, 209 F.3d at 330 (no tolling for an "innocent misreading" of a statute); *see also United States v. Sosa*, 364 F.3d 507, 512 (4th Cir.2004) (no tolling for "ignorance of the law"); *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir.2001) (same); *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir.2000) (same); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir.2000) (same); *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir.1991) (same); *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 21 (3d Cir.1981) (same).

The Menominee Tribe faced no extraordinary circumstances because the obstacles the Tribe confronted were ultimately of its own making. The Tribe makes three arguments that "extraordinary circumstances" prevented it from timely filing its claims. We examine them in turn to explain why we ultimately conclude that, while the events the Tribe identifies were perhaps confusing or discouraging, they cannot be characterized as "extraordinary circumstances" under *Holland*.[4] At bottom, the Tribe's inadequate responses to relatively routine legal events caused it to delay pursuing its claims. At no point was the Tribe prevented by external obstacles from timely filing.

The Menominee Tribe's first argument is that, because the *Ramah* district court certified a class

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[4] The *Holland* Court was explicit that equitable tolling is available to a party "only" if it shows (1) reasonable diligence and (2) extraordinary circumstances. 560 U.S. at 649, 130 S.Ct. 2549; *see Ross v. Varano*, 712 F.3d 784, 802 (3d Cir.2013) (describing a showing of extraordinary circumstances as "necessary to support equitable tolling"); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750 (6th Cir.2011) (holding that a litigant seeking equitable tolling "must demonstrate both that he has been diligent in pursuing his rights and that an extraordinary circumstance prevented his timely filing"); *see also Manning v. Epps*, 688 F.3d 177, 184 & n. 2 (5th Cir.2012) (same); *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir.2006) (same). *But see Arctic Slope II*, 699 F.3d 1289 (finding equitable tolling without separately addressing the two *Holland* prongs). Because no extraordinary circumstances stood in the Tribe's way, we need not pass on whether, under *Holland*'s first prong, the Tribe pursued its rights diligently. Nor do we reach the Tribe's arguments that the court should consider various other equitable "factors," such as whether the government would be prejudiced by the application of equitable tolling in this case, or whether equitable tolling should be more readily available to tribes given their special relationship to the United States.

action without requiring class members to exhaust administrative remedies, it was "logical to assume, as the tribe did" that the Tribe would also be a member of the *Cherokee Nation* class. Appellant Reply Br. at 14. The Tribe argues that it reasonably expected that, as a class member, it either could have recovered its costs through that litigation or, once the district court denied class certification, at least have the statute of limitations on its claims tolled for the two years the class certification motion had been pending, allowing it to timely file in 2005 claims that it contends accrued in 1998.

The flaw in the Tribe's calculations was that it was not eligible to participate in the *Cherokee Nation* class. Class-action tolling is available to members of yet-to-be-certified class actions. Under that doctrine, the "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). However, as we held in *Menominee II*, class-action tolling does not extend to putative class members who fail to satisfy known jurisdictional prerequisites to participation, because "[u]ntil they satisfy the jurisdictional preconditions to class membership," they know for certain they will not be members of the resulting class. 614 F.3d at 528. Knowing they cannot participate whether a class is certified or not, they "face none of the uncertainty class-action tolling is meant to ameliorate." *Id.* Therefore, in *Menominee II*, we held that because the Tribe had failed to exhaust its administrative remedies—and was therefore jurisdictionally barred from participating in the *Cherokee Nation* class—the Tribe was

not entitled to class-action tolling during the pendency of the class certification motion in that case. *Id.* at 529.

The Menominee Tribe now argues that it only discovered in 2010—when we rejected its claimed entitlement to class-action tolling in *Menominee II*—that it would be ineligible for tolling on that ground. Thus, according to the Tribe, it learned the effective deadline for filing its claims after it was already too late to meet it. But the Menominee Tribe's belief that it could participate in the *Cherokee Nation* class without exhausting its administrative remedies was unjustified. Although the decision of the New Mexico district court in *Ramah* may have given the Tribe the impression that its failure to exhaust would not exclude it from the *Cherokee Nation* class, the weight of legal authority was to the contrary. As we explained in *Menominee II*, "[t]he Federal Circuit and the Court of Claims have long held that the court may not exercise jurisdiction until the contracting officer either issues a decision on the claim or is deemed to have denied it." 614 F.3d at 526 n. 3. Where exhaustion is a prerequisite to the exercise of a court's jurisdiction, "every class member must exhaust its administrative remedies." *Id.* at 526. The Tribe's reliance on *Ramah* as reason to expect that it was eligible to participate in the *Cherokee* class was the Tribe's miscalculation, not an external circumstance beyond its reasonable control.[5]

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[5] A divided panel of the Federal Circuit held that equitable tolling was warranted in *Arctic Slope II*, 699 F.3d 1289, a case similar to this one, because the Tribes "took reasonable, diligent, and appropriate action as the legal landscape evolved," *id.* at 1297, and reasonably relied on *Ramah* and *Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099 (D.N.M.2006), which the court described as "controlling legal authority . . that [the Tribes] did

The second obstacle the Menominee Tribe identifies also fails to clear the "extraordinary circumstance" threshold. The Tribe argues that the certainty of failure it confronted in bringing its claims was an impediment that stood in its way. According to the Menominee Tribe, the IHS's legal position that it was not obligated to pay contract support costs and its pattern of refusals to pay such costs meant that the Tribe confronted a legal landscape so bleak that filing a claim would have been "a fruitless exercise, with no hope of success." Appellant Reply Br. at 15. It was "obvious IHS would deny any claims," says the Tribe, given the agency's "consistent position interpreting the statute to allow it to fund less than 100% of [contract support costs]." *Id.* at 13.

The Menominee Tribe failed to take the steps it would have needed to take to preserve its claims pending judicial correction of IHS's error. A party is not excused from timely filing its claim because the agency's view of the law might be inhospitable. The federal courts, not contracting officers, are the final

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not need to exhaust administrative remedies to be a class member," *id.* at 1298. The Federal Circuit also found that tolling would not disadvantage the government. *Id.* at 1297. The *Arctic Slope II* majority did not separately address *Holland*'s requirement of "extraordinary circumstances," however, beyond a concluding comment that the case involved "unique facts and extraordinary circumstances" that, together with the government's fiduciary duty to the Tribes, warranted equitable tolling. *Id.* at 1297. In our view, the *Arctic Slope II* majority failed to identify any obstacle that stood in the Tribe's way to prevent timely filing of its claims, as required by *Holland* 's second prong. We thus agree with the dissent in *Arctic Slope II* that equitable tolling was unwarranted there, as it is here, for want of an "extraordinary circumstance" under *Holland*. 699 F.3d at 1300 (Bryson, J., dissenting).

word on federal law, and "[t]he only sure way to determine whether a suit can be maintained is to try it." *Commc'ns Vending Corp. of Ariz. v. FCC*, 365 F.3d 1064, 1075 (D.C.Cir.2004) (quoting *Fiesel v. Bd. of Ed. of New York*, 675 F.2d 522, 524 (2d Cir.1982)). As we have explained, "a suitor cannot toll or suspend the running of the statute by relying upon the uncertainties of controlling law. It is incumbent upon him to test his right and remedy in the available forums." *Id.* (quoting *Fiesel*, 675 F.2d at 524–25). Even though the Tribe doubted the viability of its arguments, its claims had the same probability of success as the Cherokee Nation's claims that ultimately succeeded before the Supreme Court.

No matter how adverse the agency's legal position and the Ninth and Tenth Circuits' precedents may have been, they did not stand in the Tribe's way. Under the ISDA, tribes have some choice about where they file their claims, and thus need not pursue their claims in jurisdictions with adverse precedent, but may proceed to any federal district court with jurisdiction over the agency where venue is proper. *See Menominee II*, 614 F.3d at 522. Before 2002, no circuit had excused the government from its obligation to fully fund contract support costs out of unrestricted appropriations. Even after the Ninth and Tenth Circuits held against other tribes on claims like the Menominee Tribe's, the Tribe could have appealed a contracting officer's claim denial in another circuit, and had something more than "no hope of success." Pursuant to the CDA, the Tribe could also have obtained review in the Court of Appeals for the Federal Circuit. Until 2003, that court had not yet settled the question whether the government had a contractual obligation to pay tribal contractors for all their contract support costs, and by 2003—two years

before the Supreme Court decided *Cherokee Nation*—had ruled in favor of plaintiffs on claims essentially identical to the Menominee Tribe's. *See Thompson*, 334 F.3d at 1087–88. From that point onward, the Tribe could have appealed to that court and won.

Even assuming the Menominee Tribe lacked the resources to pursue its own litigation in federal court, its eligibility to participate in the *Cherokee Nation* class would have required nothing more than some paperwork. The procedure for exhausting administrative remedies is simple, and the Tribe has not argued otherwise. *See Menominee III*, 841 F.Supp.2d at 102 (explaining that pursuing a CDA claim "'need not be elaborate' and can be reflected in letters alone" (quoting *Arctic Slope I*, 583 F.3d at 797)). Even if a contracting officer were to deny the Menominee Tribe's claim, exhaustion of administrative remedies would have made the Tribe eligible to participate in the *Cherokee Nation* class, and thus entitled it to class-action tolling while the motion for class certification was pending in that case. What stood between the Tribe and class-action tolling was little more than an envelope and a stamp.

The Menominee Tribe cites cases holding that a lack of clear legal precedent might constitute an extraordinary circumstance. *See, e.g.*, *Harris v. Carter*, 515 F.3d 1051 (9th Cir.2008); *Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir.1995). We do not disagree. One can imagine circumstances in which the law might be so unfavorable that it functions as an obstacle and perhaps even rises to the level of an extraordinary circumstance. In *Harris* and *Capital Tracing*, for example, the parties relied "in good faith on then-binding circuit precedent" in deciding when and how to file their claims. *Harris*, 515 F.3d at 1055;

see Capital Tracing, 63 F.3d at 863. Because it was only as a result of the reversal of previously binding precedent that the parties' claims became untimely, the courts determined that equitable tolling was appropriate. The general rule, however, is that legal decisions based on unclear or contrary precedent justify equitable tolling in only the rarest instances. *See Boling v. United States*, 220 F.3d 1365, 1374 (Fed.Cir.2000) (declining to equitably toll statute of limitations even where the underlying action appeared futile during the limitations period).

Finally, even if no single circumstance stood in its way, the Menominee Tribe argues, the Court should consider all the factors that the Tribe faced as jointly amounting to an "extraordinary" obstacle. The Tribe points to "the breadth and complexity of [the contract support costs] litigation involving hundreds of tribes, the precedent of a similar prior class action in which the Tribe was a member of the class, the unique government-to-government and trust relationship between the United States and the Tribe, and the unsettled case law regarding the legal standard governing the Government's duty to pay full [contract support costs] under the ISDA." Appellant Br. at 17.

That argument fails because none of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims. Some are not obstacles. Neither the "unique government-to-government and trust relationship between the United States and the Tribe," *id.* at 17, nor the "litigation history" surrounding contract support costs claims, *id.* at 19, were capable of standing in the Tribe's way. Others we cannot accept. If a lawsuit's "breadth and complexity" were an "extraordinary circumstance," few statutes of limitations would

function. And the remaining circumstances—the Tribe's mistaken belief that it would be entitled to class-action tolling and that its claims had no hope of success—were the Tribe's own missteps. On the facts of this case, we cannot conclude that a series of events, none extraordinary on its own, piled up to create an extraordinary obstacle.

III.

The Menominee Tribe also appeals the denial of two "stable-funding" claims—that is, claims that the Tribe was entitled to contract support cost funding in 1999–2000 at least as high as that paid by the government in 1998. The parties appear to agree, and the court below held, that those claims are time barred unless the limitations period on the Tribe's 1997 and 1998 claims is tolled. *See Menominee III*, 841 F.Supp.2d at 111; Appellant Br. at 48–49; Appellee Br. at 47. Because, for the reasons discussed above, the circumstances here do not warrant equitable tolling on the Tribe's 1997 and 1998 claims, we affirm the judgment of the district court dismissing the Tribe's 1999–2000 stable funding claims.

* * *

Delays caused by a party's inauspicious legal judgments are not "extraordinary circumstance[s]" sufficient to justify equitable tolling. Faced with a variety of reasonable litigation options, the Menominee Tribe chose to wait and see if more favorable law would appear. In so doing, the Tribe allowed its claims to expire. Because we find that no obstacle stood in the Menominee Tribe's way of bringing the claims within the limitations period, the judgment of the district court is affirmed.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case Number 07-cv-0812 (RMC)

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendant.

January 24, 2012, Decided;
January 24, 2012, Filed

MEMORANDUM OPINION

Judges: ROSEMARY M. COLLYER, United States District Judge.

Opinion by: ROSEMARY M. COLLYER

The Menominee Indian Tribe of Wisconsin (the "Tribe" or "Menominee") returns to this Court upon remand from the D.C. Circuit, continuing to seek monies from the Department of Health and Human Services, Indian Health Service ("IHS") for contract support costs the Tribe incurred in providing health care services to its members in 1995-2000. In reversing this Court, the Circuit found that the six-year limitation period for presenting administrative claims, as allowed by the Contract Disputes Act, 41 U.S.C. § 401, et seq, can be equitably tolled.

Menominee Indian Tribe of Wisconsin v. United States, 614 F.3d 519, 529, 392 U.S. App. D.C. 202 (D.C. Cir. 2010) ("*Menominee II*") ("We agree that the statute is subject to tolling and remand for the district court to consider whether tolling is appropriate in this case."). The Tribe argues that it is entitled to equitable tolling because: 1) it reasonably relied on a potential class action brought by other tribes complaining of the same insufficient payments; 2) it reasonably believed it was a member of the putative class and thereby was pursuing its claims for contract support costs; and 3) it reasonably believed that, as a member of the proposed class, it was entitled to suspension of the limitations period during the class certification period.

The United States moves to dismiss, or alternatively for summary judgment, arguing that no equitable tolling is appropriate and that, on the merits, Menominee received all the monies to which it was entitled or that it waived its rights to seek more. The United States also argues that the Tribe cannot recover on its 1999 and 2000 stable-funding claim because even if it were not barred by the statute of limitations, nearly all of the appropriated money was spent. The Tribe opposes each of these arguments and also moves for summary judgment. The Court will grant summary judgment to the United States with respect to the 1996-1998 shortfall claims and the 1999 and 2000 stable-funding claim. The Court will deny both parties' motions with respect to the 1995 shortfall claim.

I. FACTS

The Menominee Indian Tribe of Wisconsin is a federally recognized Indian tribe and is eligible to enter into contracts with the United States under the Indian Self-Determination and Education Assistance

Act ("ISDA"), 25 U.S.C. § 450. The ISDA authorizes tribes to execute "self-determination" contracts with the IHS in order to provide health care programs and other services to their members that the United States has historically provided. The United States pays tribes the amounts the federal government would otherwise spend for such health-related programs and services as well as various administrative costs incurred by the tribes (contract support costs or "CSC").

Each year from 1995 to 2000, Menominee provided health care services to eligible members pursuant to its self-determination contracts. From 1996 to 2000, the Tribe also signed "Rate Agreements" and "Annual Funding Agreements."[1] The Rate Agreements were negotiated with the Department of Interior and, according to the Tribe, were used to calculate accurate CSC for the programs and services the Tribe administered. The Annual Funding Agreements were negotiated with the IHS and, according to the United States, included all CSC owed to the Tribe.[2] For each year, IHS paid the Tribe the amount of CSC enumerated in the Annual Funding Agreements, but did not pay the amount of CSC the Tribe says is owed

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[1] In 1995, the Tribe had a Rate Agreement but no Annual Funding Agreement. For that year, the lump-sum CSC was listed in the self-determination contract and not in a separate agreement.

[2] The Tribe contends that there was no negotiation with respect to the Annual Funding Agreements and that IHS knew that there were insufficient appropriations to pay full CSC for every eligible tribe and therefore offered a lesser amount on a "take it or leave it" basis. If additional funds came in, IHS would unilaterally modify the funding agreements and pay the Tribe more; however, there was never sufficient money to fully pay the CSC as calculated using the rates in the Rate Agreements.

pursuant to the Rate Agreements. Menominee seeks damages for the unpaid CSC for 1995-2000.

II. LAW

A. Indian Self-Determination and Education Assistance Act

Congress enacted the ISDA in 1975 to allow American Indians and Alaska Natives to contract with the federal government to operate a variety of programs, functions, services, and activities previously provided by the federal government. See 25 U.S.C. § 450. For instance, the Secretary of Health and Human Services, through IHS, has provided health care programs to American Indians. Under the ISDA, an Indian tribe can contract with IHS and administer its own health care programs and the Secretary pays the tribe both the costs IHS would have expended for the programs (the "base" or "Secretarial" costs) and CSC.

CSC include both direct costs (such as workers' compensation insurance) and indirect costs (such as rent, utilities, and payroll for management and administration) that a tribe incurs in administering its programs. *See Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005). Most CSC are indirect and they are "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." *Id.* at 635 (quoting Br. for Federal Parties at 7).

B. Contract Disputes Act

In 1978, Congress enacted the Contract Disputes Act ("CDA") which "establishe[s] a comprehensive framework for resolving contract disputes between executive branch agencies and government contractors."

Menominee II, 614 F.3d at 521. As originally enacted, there was no statutory time limit to bring a contract dispute claim under the CDA. In 1994, Congress amended the CDA to require that contract disputes be submitted to the contracting officer of the relevant agency "within six years after the accrual of the claim."[3] *See* 41 U.S.C. § 605(a). The submitted claim "need not be elaborate" and can be reflected in letters alone. *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 797 (Fed. Cir. 2009).

Once a claim has been submitted, the contracting officer generally has 60 days to issue a decision. *See* 41 U.S.C. § 605(c).[4] If the decision is unfavorable or not timely issued, the contractor can appeal the decision to the board of contract appeals within the relevant agency or, within 12 months, file suit in the United States Court of Federal Claims. *Menominee II*, 614 F.3d at 521. The present case was brought in the District Court for the District of Columbia instead of the Court of Federal Claims because the ISDA allows a tribe to bring a contract claim in a federal district court. *Id.* at 522 (citing 25 U.S.C. § 450m-1(a)).

C. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face. Fed. R. Civ. P. 12(b)(6). A complaint must be sufficient

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[3] The only exception is for a government claim against a contractor involving fraud. *See* 41 U.S.C. § 605(a).

[4] If the claim is for more than $100,000, the contracting officer must issue a decision within 60 days, or notify the contractor of when the decision will be issued. 41 U.S.C. § 605(c)(2). In the latter case, the decision should be issued "within a reasonable time." *Id.* at § 605(c)(3).

"to give a defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted). In deciding a motion under Rule 12(b)(6), a court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059, 378 U.S. App. D.C. 355 (D.C. Cir. 2007). If, in considering a Rule 12(b)(6) motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); see *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 165, 357 U.S. App. D.C. 35 (D.C. Cir. 2003). Because the Court has considered matters outside of the pleadings, it will treat the United States' motion as one for summary judgment.

D. Motion for Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Moreover, summary judgment is properly granted against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675, 334 U.S. App. D.C. 92 (D.C. Cir. 1999). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Id.* at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

III. ANALYSIS

On March 14, 2008, this Court granted in part and denied in part the United States' motion to dismiss. *Menominee Indian Tribe of Wisconsin v. United States*, 539 F.Supp.2d 152 (D.D.C. 2008) ("*Menominee I*"). The Court held that the statute of limitations for filing claims under the CDA barred the 1996-1998 CSC funding claims and that the statute is jurisdictional in nature and therefore not subject to tolling. *Id.* at 153-54. The Court also held that the 1995 CSC funding claim was barred by laches. Id. at 154-55. The Court denied the motion to dismiss with respect to the 1999-2004 claims because the "ISDA mandates the payment of full indirect CSC. . ." *Id.* at 155 (emphasis in original).

On November 18, 2011, the parties stipulated to the dismissal of the 1999-2004 shortfall claims and Menominee then appealed this Court's decision. The D.C. Circuit reversed this Court and held that the

CDA statute of limitations for filing administrative claims in federal court is not jurisdictional and is thus subject to equitable tolling. *Menominee II*, 614 F.3d at 523-25. The Circuit also held that class action tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), is inappropriate here because Menominee did not timely file an administrative claim and therefore would not have been part of the class in Cherokee Nation even had one been certified. *Id.* at 526-529. While the Circuit held that the CDA may be equitably tolled, it could not determine whether it should be tolled in this case because the parties disputed relevant facts.[5] *Id.* at 531. The Circuit remanded the case to determine whether equitable tolling is appropriate. *Id.*

With respect to laches, the Circuit held that the district court: 1) miscalculated the length of the Tribe's delay in submitting a claim; 2) failed to consider the Tribe's argument that the delay was reasonable; and 3) relied on insufficient reasons to hold that the government was prejudiced by the delay. *Id.* at 531-32. The Circuit remanded for the Court to determine if the 1995 claim is barred by laches. *Id.* at 531.

The United States has abandoned it laches argument and instead contends that equitable tolling is inappropriate; that the Tribe released its 1996, 1997, and 1998 claims; that there was no breach of contract because the United States paid the full amounts listed in the Annual Funding Agreements; and that even if

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[5] Although the United States argued that there were disputed facts, it now agrees that "[i]t is the significance of these facts, and not the facts themselves, that remain in dispute." Def.'s Supp. Brief [Dkt. # 48] at 2. The Tribe concurs that there are no material facts in dispute that are relevant to the question of equitable tolling. Pl.'s Supp. Brief [Dkt. # 47].

there were a breach, Menominee could not recover because there are no longer appropriated funds for the years at issue. Menominee disagrees, asserting that equitable tolling is appropriate; that the alleged releases are invalid; that the United States has not paid the amount of CSC calculated under the Rate Agreements; and that there were sufficient funds during the contract years to pay its CSC claims fully so that it is irrelevant if there are not funds available now.

A. Equitable Tolling (1996-1998 CSC Claims)

In litigation between private parties, "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). A party seeking equitable tolling has a "high" hurdle to clear. *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579, 332 U.S. App. D.C. 182 (D.C. Cir. 1998). "Statutes of limitations are not arbitrary obstacles to the vindication of just claims . . . . They protect important social interests in certainty, accuracy, and repose." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990). As such, "[t]he court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances." *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1057, 269 U.S. App. D.C. 306 (D.C. Cir. 1988).

The Supreme Court recently reaffirmed that a litigant must establish two things for equitable tolling to apply: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland v. Florida*, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). The Tribe

argues that it need not meet this two-prong test because immediately after setting forth this test, the Supreme Court "stressed the flexible nature of tolling as an equitable doctrine" and that "[e]quitable powers are to be exercised 'on a case-by-case' basis rather than according to 'mechanical rules.'" Pl.'s Opp'n at 17 (quoting *Holland*, 130 S.Ct. at 2563).

The flexibility emphasized by the Supreme Court, however, dealt with how courts analyze cases under (not instead of) the two-part rule. Specifically, the Supreme Court rejected the Eleventh Circuit's mechanical rule that attorney misconduct can never be an "extraordinary circumstance" justifying equitable tolling absent "bad faith, dishonesty, divided loyalty, mental impairment or so forth . . . ." *Holland*, 130 S.Ct. at 2562-63. The Supreme Court's rejection of a hard and fast rule to identify "extraordinary circumstances" does not give this Court license to ignore the necessity for an "extraordinary circumstance." "[C]ourts of equity 'must be governed by rules and precedents no less than the courts of law.'" *Id.* at 2562 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996)). In other words, the Court should "flexibly" consider: 1) whether the Tribe diligently pursued its rights, and 2) whether an extraordinary circumstance prevented it from failing to file a timely claim. The Court has no leeway in the name of "equity" to ignore either factor.

The Tribe relies on the long history of tribal litigation with respect to CSC to support its claim for equitable tolling:

> Despite the clear language of the ISDA, both IHS and the Bureau of Indian Affairs ("BIA") have resisted paying full CSC for at least twenty years, leading to extensive litigation.

In 1991, the Ramah Navajo chapter filed a class-action suit against the Secretary of the Interior alleging that BIA systematically underpaid indirect costs by using a flawed indirect cost rate calculation methodology. *Ramah Navajo Chapter v. Lujan*, No. 90-0957 (D.N.M.) ("Ramah"). The case later came to include "shortfall claims" of the kind Menominee raises in this case . . . .

In 1993, Ramah moved for certification of a nationwide class of all tribal contractors who had contracted with BIA under the ISDA, and Judge Hansen certified the class. . . . [Despite the Government's argument] Judge Hansen held, however, that exhaustion would be futile, so "it is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act." *Id.* at 4. The fact that Ramah had timely presented its claims satisfied the CDA requirement, and other tribal contractors could participate in and benefit from the class action even if they had not separately presented their own claims.

In 1997, The Tenth Circuit ruled in favor of Ramah on liability. *Ramah Navah Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Settlement discussions ensued [and a partial settlement of $76M was approved]. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). [Menominee shared in this and a subsequent distribution.] . . .

The Cherokee Nation filed a separate class action against IHS on March 5, 1999. Both the class and the claims were nearly identical

> to those in the *Ramah* case. The Cherokee Nation, like Ramah before it, challenged a uniform agency CSC policy . . . . The proposed class was defined as "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs . . . ." *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. at 360 . . . . Given the [Menominee] experience with the Ramah class, it relied on the Cherokee class action to represent its claims and it did not file its own lawsuit. Pl.'s Opp'n at 20-21.

Class certification was denied in Cherokee Nation on February 9, 2001. *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 363 (E.D. Okla. 2001). The Oklahoma District Court later ruled that there was no statutory duty to fund contract support costs fully when there were insufficient appropriations. *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248, 1260-61 (E.D. Okla. 2001). Cherokee Nation appealed the latter decision but did not appeal the denial of class certification. The Tenth Circuit affirmed the district court on appeal. *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002). That same year, the Ninth Circuit, in *Shoshone-Bannock Tribes v. Secretary*, Dep't of Health and Human Servs., 279 F.3d 660 (9th Cir. 2002), also ruled that tribes are not statutorily entitled to recover full CSC if Congress has not appropriated sufficient funds.

The Federal Circuit disagreed with the Ninth and Tenth Circuits, *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), and the Supreme Court granted certiorari to resolve this split. *Cherokee Nation of Okla. v. Thompson*, 541 U.S. 934, 124 S. Ct. 1652, 158 L. Ed. 2d 354 (2004). Given the circuit conflict and imminent review by the Supreme Court, Menominee

decided to wait for the Supreme Court ruling before filing a claim. Although the Tribe was aware of the six year statute of limitations, it believed the statute was tolled (as in *Ramah*) by the *Cherokee Nation* suit. Thus, with its limited resources, the Tribe opted not to pursue a claim until the Supreme Court decided whether the government has a statutory obligation to fund fully the CSC contractually agreed to.

The Supreme Court affirmed the Federal Circuit on March 1, 2005. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005). In so doing, the Court rejected the government's argument that it was not required to pay the full CSC enumerated in Annual Funding Agreements. *Id.* 638-40.[6] Six months later, Menominee filed its administrative claims.

Menominee argues that given its prior success in *Ramah*, it was reasonable to wait for the resolution of the Cherokee Nation case before filing its administrative claim. As part of this argument, Menominee states that the United States discouraged the filing of claims prior to the *Cherokee Nation* decision by the Supreme Court by arguing that tribes who filed claims could not be part of the *Cherokee Nation* class. Finally, Menominee argues that the class pleading in Cherokee Nation was "defective" and thus equitable tolling is appropriate under *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) and *American Pipe & Construction Co. v. Utah*,

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[6] One notable difference between the agreements in the Cherokee Nation case and those here is that the CSC listed in Cherokee Nation's Annual Funding Agreement was unpaid. *Cherokee Nation*, 543 U.S. at 635. Here, IHS paid the CSC amount listed in Menominee's AFA but did not pay CSC calculated using the rates in the Rate Agreements

414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). *Id.* at 18-19. The Court will address each of these arguments, applying the *Holland* framework.

i. Reasonable to wait

Having previously benefitted from the *Ramah* case (without filing a claim or suit), Menominee likewise believed that it would benefit from *Cherokee Nation* (without filing a claim or suit). Menominee was aware that it only had six years to file a claim, but assumed that the deadline would be tolled based upon *Cherokee Nation*. See Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶ 8. Menominee points out that it was not until 2005 that it knew that it could get recompensed for CSC shortfalls, and that it was not until 2010 after *Menominee II* that it knew it needed to have filed a claim to benefit from the *Cherokee Nation* class action. Given this changing legal landscape and its prior success with Ramah, Menominee argues that it was reasonable to wait for resolution of *Cherokee Nation* before filing its administrative claim. Although the Court is sympathetic, the complete historical facts do not demonstrate that Menominee was diligent in pursuing its claims or that the lack of clarity in the law was an "extraordinary circumstance" to justify equitable tolling.

First, Menominee's focus on the *reasonableness* of its decision to wait is misplaced. Although it may have been reasonable, given the circumstances, for Menominee to expect to benefit from the *Cherokee Nation* class without filing an administrative claim or attempting to join the action (a point the Court does not reach), the reasonableness of that decision does not necessarily mean that Menominee "pursu[ed] [its] rights diligently." *Holland*, 130 S. Ct. at 2562. Litigants routinely abandon claims given the costs

of litigation, limited financial resources, and/or the uncertainty of the outcome. If a court equated reasonableness in waiting with diligence in pursuing, a statute of limitations could be tolled indefinitely, even for litigants who reasonably decide to abandon their claims. At most, Menominee has demonstrated reasonable inaction, not reasonable diligence, but the latter is required for equitable tolling.

Second, the factors Menominee has identified (prior class action, uncertain legal standard, limited resources, etc.) do not, individually or collectively, amount to "an extraordinary circumstance." Again, it is common for a litigant to be confronted with significant costs to litigation, limited financial resources, an uncertain outcome based upon an uncertain legal landscape, and impending deadlines. These circumstances are not "extraordinary" and are therefore insufficient to support Menominee's claim for equitable tolling.

ii. Government's alleged switch of position

As part of its argument that it was reasonable to wait for the Supreme Court ruling in Cherokee Nation, Menominee alleges that "[d]uring the *Cherokee* case, the Government argued that contractors who presented their own claims should be *excluded* from the class." Pl.'s Opp'n at 21 (emphasis in original). Later, Menominee argues that "it was not until after the Supreme Court's decision [in *Cherokee Nation*] that the government argued, for the first time[,] that asserted class members must first have presented claims to the contracting officer in order to participate in the class." *Id.* at 23. Even looking at the facts in a light most favorable to Menominee, these assertions are in error.

First, Menominee's latter statement is directly contradicted by its own brief. Menominee admits that when Ramah moved for class certification in 1993, "[t]he Government argued that the class could not be certified unless each class member had first exhausted its administrative remedies by filing claims with the agency contracting officer as required by the Contract Disputes Act." *Id.* at 20. Thus, the Government could not have been arguing "for the first time [after the *Cherokee Nation* decision in 2005] that asserted class members must first have presented claims to the contracting officer." *Id.* at 23.

Second, the Government did not, in fact, argue "[d]uring the Cherokee case . . . that contractors who presented their claims should be excluded from the class." *Id.* at 21. Instead, the United States argued that: 1) "[c]ertification of the proposed class would improperly interfere with the litigation of cases raising similar or related issues in other judicial districts,"[7] and 2) "[t]ribes that have received previous judicial decisions on their claims cannot be included in the class because their claims would be barred by the principles of res judicata." *Id.* at 13 (citing *Robertson v. Isomedix, Inc.*, 28 F.3d 965, 969 (9th Cir. 1994)). Thus, the United States was arguing that no class should be certified, not that tribes, by merely filing an administrative claim, would not be allowed to be part of the class if one were certified.

Third, and most importantly, the United States' litigation position throughout these disputes—even if

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[7] Def.'s Opp'n to Plaintiffs' Mot. for Class Certification [Dkt. # 88] at 12-13, *Cherokee Nation of Okla. v. United States*, No. 99-092 (E.D. Okla. 2000) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)).

its position had changed or were inaccurate—does not excuse Menominee's failure to file a timely claim. *See Moreno v. United States*, 82 Fed. Cl. 387, 403 (2008) ("If the fact that the agency expresses a position which turns out to be incorrect is a warrant for tolling, the limitations period would be suspended indefinitely.")

iii. Defective pleading

Menominee claims that equitable tolling is appropriate in this case because of a "defective pleading" filed in *Cherokee Nation*. Menominee argues that because the class as pled was defective under Rule 23, Cherokee Nation filed a "defective pleading" which warrants equitable tolling here. Pl.'s Reply at 16 [Dkt. # 41]; Pl.'s Opp'n at 19 (the lack of commonality, typicality, and adequate representation in *Cherokee Nation* "is a classic defective pleading scenario.")

Menominee's argument ignores the distinction between a defective class and a defective pleading (such as a complaint in the wrong forum, *see, e.g.*, *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965)). The former supports class action tolling; the latter supports equitable tolling. Because there was no defective pleading, *Burnett* is inapposite and Menominee cannot rely on it to support equitable tolling. Moreover, *Burnett* is distinguishable because the plaintiff in that case pursued its claim by filing a complaint (albeit in the wrong court). In this case, the Tribe did not file a complaint anywhere within the limitations period. Accordingly, Menominee's reliance on *Burnett* is further misplaced, and the Tribe's statement that "it had, in effect, filed a defective pleading in the wrong court" is incorrect. Pl.'s Reply at 18.

Menominee's reliance on *American Pipe & Contruction Co.* is also misplaced. American Pipe dealt with class action tolling, not equitable tolling. *See Menominee*, 614 F.3d at 526-29.[8] The Circuit has already made it clear that class action tolling under *American Pipe* is inappropriate in this case. *See id.* Thus, Menominee's reliance on *American Pipe* to support equitable tolling is unavailing.

iv. Equitable Tolling Conclusion

Menominee is correct that equitable tolling is more than just a mechanical application of the two *Holland* factors. However, 1) Menominee cannot point to any affirmative act it took in over six years to pursue its claim diligently; 2) filing an administrative claim is a relatively simple process; 4) there was no affirmative misconduct on the part of the government; and 5) Menominee does not present any additional facts from which the Court could find equitable tolling aside from those found insufficient to support class action tolling. Thus, equitable tolling is inappropriate and the Court will enter summary judgment will on behalf of the United States.

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[8] Although in passing the Supreme Court suggested that American Pipe dealt with equitable tolling, *Irwin*, 498 U.S. at 95-96, *Irwin* did not address the distinction between class action tolling and equitable tolling. *American Pipe* actually dealt with class action, not equitable tolling. *See generally American Pipe*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713. *See also Menominee II*, 614 F.3d at 526-529; *Irwin*, 498 U.S. at 96 n.3 (citing American Pipe and parenthetically stating "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members."); *cf. Bright v. United States*, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010) (class action tolling and equitable tolling require different analysis).

B. 1995 Claim

The 1995 claim is not subject to the statute of limitations because the self-determination contract was executed before there was a statute of limitations in the Contract Disputes Act. 48 C.F.R § 33.206. Thus, equitable tolling is not applicable to this claim. There are, however, genuine issues of material fact preventing the Court from granting summary judgment to either party on this claim.

First, the cost rate for 1995 is unclear; it is either 13.80% or 12.73%. *See, e.g.*, Def.'s Reply [Dkt # 38]. Second, Menominee's damage figures set forth in its reply brief do not match those in its Complaint. Third, although the parties agree that $827,534 in CSC was carried over from 1995 to 1996, they disagree as to whether this impacts the amount of CSC due in 1995. The effect of the carry over from 1995 will have to be further briefed before the Court can conclude whether Menominee is entitled to damages on its 1995 claim.

C. 1996 Claim

Because the Court has determined that equitable tolling is unavailable, there is no need to address each of the government's alternative arguments for judgment for the 1996-1998 years. The Court notes, however, that Menominee's 1996 CSC claim would be time barred even if equitable tolling were appropriate.

Menominee argues that the statute of limitations on its claim for 1996 did not begin to run until January 1, 1999. It relies on the "common formulation," Pl.'s Opp'n at 27, that "[a] claim accrues when damages are ascertainable." *Id.* (quoting *Patton v. United States*, 64 Fed. Cl. 768, 774 (2005) (citations and internal quotations omitted)). Since the 1996 contract did not close until 1998, Menominee argues that its

damages were not ascertainable until then. "Until then, IHS could have, and did, supplement CSC for prior years in which the contract was in effect." Pl.'s Opp'n at 27. The argument is without merit. When the 1996 Annual Funding Agreement ended, Menominee knew that the government had not paid it full CSC. Once Menominee knew or should have known that it had a claim for additional contract support costs, the statute of limitations began to run, even if the precise amount of the underpayment had to be further calculated. See Kinsey v. United States, 852 F.2d 556 (Fed. Cir. 1988) ("where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract"); *Brighton Vill. Assocs. v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (claims for breach of contract generally accrue at the time of the breach).

Moreover, adopting Menominee's argument— that a claim for failing to pay under the Annual Funding Agreement does not accrue until the expiration of the self-determination contract—could extend the statute of limitations indefinitely. An initial self-determination contract may last for up to three years. 25 U.S.C. § 450j(c)(1)(A). After the contract has "matured," (i.e., been in force for three or more years without significant, material audit exceptions), a tribe can choose a longer contract term, including an indefinite term. 25 U.S.C. § 450b(h) and 450j(c)(1)(B). Thus, if the statute of limitations did not begin to run until after a self-determination contract expired, the limitations period would remain open indefinitely for tribes with an indefinite contract term. Such a result would eviscerate the statute of limitations without any equitable basis. Accordingly, the Court finds that the

statute of limitations began to run when Menominee's Annual Funding Agreements each expired and not when the underlying self-determination contract expired.

D. 1999 and 2000 Stable-Funding Claim

Menominee claims that it was underpaid in 1999 and 2000 because the CSC paid to it were less than the amount it was owed in 1998 (the "stable-funding claim").[9] Menominee's stable-funding claim fails, however based upon the law of the case. In *Menominee I*, this Court dismissed all of Menominee's CSC claims prior to 1999 based upon the statute of limitations. See *Menominee I*, 539 F.Supp.2d at 153-54; March 14, 2008 Order [Dkt. #15]. The Court did not dismiss Menominee's claims from 1999 to 2004. *See id.* The Court's opinion and order did not distinguish between Menominee's shortfall claims for 1999 to 2004 and its *stable-funding* claim for 1999 and 2000. *See id.* The order merely dismissed all claims for contract years before 1999 and left in tact *all* claims for years after 1999. *See* March 14, 2008 Order.

After the decision issued and the order was entered, Menominee could have continued to litigate its 1999-2004 claims. Instead, it agreed to voluntarily dismiss these claims in order to appeal the Court's dismissal of its 1995-1998 claims. Before doing so, however, the Tribe tried to preserve its stable-funding claim for

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[9] Menominee originally based its stable-funding claim on 1997, not 1998. In its current briefing, however, the Tribe admits that its CSC needs dropped from $404,938 in 1997 to $383,176 in 1998. *See* Pl.'s Opp'n at 36-37. Thus, its stable-funding claim is now] based upon what it was owed in 1998 and not 1997. This difference is not material, however, because the statute of limitation expired for both the 1997 and 1998 claims.

appeal. The Tribe stipulated that "[its] third Claim for Relief, entitled Stable Funding, is premised on alleged wrongs that occurred in 1997" and asked that "the Court issue a final order explicitly stating that the Tribe's [stable-funding claim] is barred by the Statute of Limitations." Joint Stipulation [Dkt. # 26] ¶ 2. As requested, the Court entered an order, stating that "[b]ecause the Tribe's [stable-funding claim] is premised on alleged wrongs that occurred in 1997, the claim is time-barred for the reasons explained in the Court's March 14, 2008 Memorandum Opinion." March 27, 2008 Order [Dkt. # 27]. Thus, going up on appeal, the law of the case was that Menominee's stable-funding claim was dependent on whether its claim for 1997 could be tolled.

On appeal, the Tribe did not challenge the Court's order that the Tribe's stable-funding claim was subject to the statute of limitations for 1997. *See* Opening Brief of Appellant, *Menominee II*. Indeed, it would have been difficult for it to do so given its stipulation that its stable-funding claim was "premised on alleged wrongs that occurred in 1997." Joint Stipulation ¶ 2. Having failed to raise the argument on appeal, Menominee's stable-funding claim continued, on remand, to rise and fall on whether or not the Court would toll the statute of limitations for either 1997 or 1998.

In its Motion for Summary Judgment, the United States points out that the Court need not reach the Tribe's stable-funding claim if it does not find that equitable tolling is warranted. The Tribe does not address this argument in its opposition. Instead, it includes a single, conclusory footnote which states, "[t]he 1999 and 2000 stable-funding claim[] [is] not subject to the statute of limitations defense." Pl.'s

Opp'n at 33 n.15. The Tribe does not explain why this claim is not subject to the statute of limitations, nor does it explain how this footnote is consistent with either its prior stipulation or the Court's prior order which held otherwise. In any event, whatever merit may lie with the argument that the 1999 and 2000 stable-funding claim is not barred by the statute of limitations that ran with the Tribe's 1997 or 1998 shortfall claim, that argument is foreclosed by the law of the case and has been waived by the Tribe.

The law of the case simply holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983); *see also LaShawn A. v. Barry*, 87 F.3d 1389, 1393, 318 U.S. App. D.C. 380 (D.C. Cir. 1996) (en banc) ("the same issue presented a second time in the same case in the same court should lead to the same result.") (emphasis in original). The Court has previously held (at both parties' request) that the Tribe's stable-funding claim was subject to the statute of limitations based upon actions in years prior to 1999 and that is the law of the case. This should not be disturbed especially when, as here, the Tribe had the opportunity to appeal this decision and failed to do so. *See, e.g., Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 250, 258 U.S. App. D.C. 124 (D.C. Cir. 1987) ("Under the law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.") Accordingly,

the Court will grant summary judgment in favor of the United States on the Tribe's stable-funding claim.[10]

IV. CONCLUSION

Because Menominee cannot demonstrate that it is entitled to equitable tolling, the Court will grant summary judgment to the United States with respect to Menominee's shortfall claims for 1996 to 1998 and its stable-funding claim for 1999 and 2000. The Court will deny without prejudice both parties' motions for summary judgment with respect to the Tribe's 1995 claim. A memoralizing Order accompanies this Memorandum Opinion.

Date: January 24, 2012

/s/ ROSEMARY M. COLLYER

United States District Judge

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[10] Additionally, the Court finds that the Tribe also waived its argument that its stable-funding claim for 1999 and 2000 is not time-barred by failing to respond to the government's argument. See, e.g., Hopkins v. Women's Div., Bd. of Global Ministries, 238 F.Supp.2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.")

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5005

MENOMINEE INDIAN TRIBE OF WISCONSIN,
Appellant

v.

UNITED STATES OF AMERICA, *et al.*,
Appellees.

November 17, 2009, Argued;
July 30, 2010, Decided

OPINION

Before: GINSBURG, TATEL and GRIFFITH, *Circuit Judges*. Opinion for the Court filed by Circuit Judge GRIFFITH.

Opinion by: GRIFFITH

GRIFFITH, *Circuit Judge*: The district court dismissed the breach-of-contract claims of a government contractor, concluding they were barred by the statute of limitations in 41 U.S.C. § 605(a) and the equitable doctrine of laches. For the reasons set forth below, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

I.

The Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601 *et seq.* (2006), established a comprehensive framework for resolving contract disputes between executive branch agencies and government contractors. *See id.* § 602(a). In 1994, Congress amended the CDA to require, with one exception not relevant here, that all claims relating to a government contract be submitted, within six years of accrual, to the contracting officer responsible for entering and administering contracts on behalf of the relevant agency. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322 (codified at 41 U.S.C. § 605(a)).[1]

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[1] As amended, section 605(a) of Title 41, titled "Contractor claims," reads in relevant part:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. *Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.* The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding.41 U.S.C. § 605(a) (emphasis added).

Once the contracting officer issues a decision on a claim or is deemed to have denied the claim by failing to issue a timely decision, *see* 41 U.S.C. § 605(a), (c), a dissatisfied contractor has two options. The contractor may, within ninety days, appeal the decision to the board of contract appeals for the relevant agency. *Id.* § 606. Or the contractor may, within twelve months, file suit in the United States Court of Federal Claims. *Id.* § 609(a). Although these two paths are mutually exclusive, *Tuttle/White Constructors, Inc. v. United States*, 656 F.2d 644, 648-49, 228 Ct. Cl. 354 (Ct. Cl. 1981), they converge at the Court of Appeals for the Federal Circuit, which hears appeals from both the agency boards and the claims court. 28 U.S.C. § 1295(a)(3), (a)(10); 41 U.S.C. § 607(g).

This appeal found its way to our court--and not our sister circuit--by an unconventional third route, made possible because the case involves a contract authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA). *See* 25 U.S.C. §§ 450 *et seq*. The ISDEAA permits Indian tribes to assume responsibility for federally funded programs or services that a federal agency would otherwise provide to the tribes' members. *See id.* §§ 450b(j), 450f(a). After the tribe and agency memorialize the transfer of authority in a "self-determination contract," they negotiate annual funding agreements, which become part of the contract. *Id.* § 450l(c) (subsection (f)(2) of model agreement). Though self-determination contracts are governed by the CDA, *id.* § 450m-1(d), the ISDEAA allows a tribe to bring an action arising under its contract in the district court rather than the Court of Federal Claims. *Id.* § 450m-1(a). The tribe exercised that option in this case.

The parties to the contract at issue are the Menominee Indian Tribe of Wisconsin and the Indian Health Service (IHS), the agency tasked with administering federal health programs for American Indians. Pursuant to a contract with IHS, Menominee has for many years operated a healthcare program for its members. The tribe alleges that the IHS has failed to pay all the "contract support costs" (reasonable administrative expenses and the like) to which it was statutorily entitled for the 1995 to 2004 contract years. *Id.* § 450j-1(a)(2) (obligating agencies to reimburse tribes' contract support costs). Menominee submitted its claims to the IHS contracting officer on September 7, 2005. After the contracting officer denied the claims in their entirety, Menominee timely filed this action for breach of contract in the district court.

The government filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. The district court lacked jurisdiction over the claims for 1996, 1997, and 1998, the government contended, because Menominee had not filed those claims with the contracting officer until after the six-year limitations period in the CDA had expired. Because that deadline does not apply to "contracts awarded prior to October 1, 1995," 48 C.F.R. § 33.206, the government argued that the tribe's claim for 1995 was barred by laches.

Menominee did not disagree that it filed its claims for 1996 to 1998 more than six years after their accrual, but argued that the limitations period should be tolled. The tribe's argument relied on the fact that in 1999 two other tribes filed a putative class action on behalf of all Indian tribes "that were not fully paid their contract support cost needs, as determined by IHS," under a self-determination contract. *Cherokee*

Nation of Okla. v. United States, 199 F.R.D. 357, 360 (E.D. Okla. 2001) (quoting Notice of Filing Revised Proposed Notice of Class Action). The district court in that case eventually denied class certification. *Id.* at 366. Menominee contended that it fell within the class described in the *Cherokee* complaint and that, under the doctrine of class-action tolling, the limitations period was suspended for two years while asserted members of the *Cherokee* class awaited the certification decision. In the alternative, Menominee asserted that principles of equitable tolling similarly excused the lateness of its claims. If either tolling theory was correct, the tribe's claims for 1996 to 1998 would not be time-barred. Menominee also disputed that laches barred its claim for 1995.

The district court dismissed the claims for 1995 to 1998. *See Menominee Indian Tribe of Wisc. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008). The court rejected Menominee's class-action tolling theory on the ground that "presentment to the contracting officer is a mandatory jurisdictional requirement and was not timely performed by the Tribe for its 1996-1998 claims." *Id.* at 154 n.2 (citation omitted). The court also declined to equitably toll the filing deadline, reasoning that "[s]tatutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them." *Id.* at 154. With respect to the claim for 1995, the district court held that laches applied because the tribe's "11-year delay in bringing suit [was] nearly double the time allowed under the statute of limitations," *id.*, and caused the government economic prejudice, *id.* at 154-55.

After the district court dismissed the tribe's remaining claims, Menominee appealed the dismissal

of its claims for 1995 to 1998. We have jurisdiction under 28 U.S.C. § 1291.

II.

We first consider the timeliness of Menominee's claims for 1996 to 1998, which are subject to the statute of limitations in 41 U.S.C. § 605(a). Menominee missed its deadline but argues that the limitations period should be tolled. The government argues that the limitations period is jurisdictional and therefore cannot be tolled, equitably or otherwise. We disagree that the limitations period is jurisdictional but agree with the government's alternative argument that class-action tolling is unavailable in this case. Nevertheless, we conclude that the limitations period in § 605(a) is subject to equitable tolling in appropriate cases and remand for the district court to consider whether it would be proper here. Our conclusions regarding the availability of class-action and equitable tolling under § 605(a) are the same as those reached by the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), *cert. denied*, No. 09-1172, 130 S. Ct. 3505, 177 L. Ed. 2d 1091, 2010 U.S. LEXIS 5433 (U.S. June 28, 2010), which issued after the parties filed their briefs in this appeal.

A. Jurisdiction

The district court treated the six-year deadline in § 605(a) as jurisdictional. *Menominee*, 539 F. Supp. 2d at 154. This was error. Filing deadlines, statutory or not, are generally nonjurisdictional. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008); *Day v. McDonough*, 547 U.S. 198, 205, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006); *Scarborough v. Principi*, 541 U.S. 401, 413-14, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004);

see also Carlisle v. United States, 517 U.S. 416, 434, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'" (footnote omitted)). The time limit in § 605(a) is no exception.

"Subject matter jurisdiction defines the [tribunal's] authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1866, 173 L. Ed. 2d 843 (2009). The Supreme Court has distinguished between prescriptions that may be "properly typed 'jurisdictional,'" *Scarborough*, 541 U.S. at 414, and those better classified as "claim-processing rules," *id.* at 413. A claim-processing rule may serve to inform a plaintiff of the time he has to file a claim, *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004), or to "protect a defendant's case-specific interest in timeliness," *John R. Sand*, 552 U.S. at 133, but it "does not reduce the adjudicatory domain of [the] tribunal," *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region (Union Pacific)*, 130 S. Ct. 584, 596, 175 L. Ed. 2d 428 (2009). *See also Dolan v. United States*, 133 S. Ct. 2533, 177 L. Ed. 2d 108, 113 (2010) (slip op. at 4) (noting that a claim-processing rule "do[es] not limit a [tribunal's] jurisdiction, but rather regulate[s] the timing of motions or claims").[2]

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[2] In dismissing for lack of subject-matter jurisdiction, the district court implicitly concluded that the time limitation in § 605(a) demarcates the jurisdiction of the reviewing court, not only the jurisdiction of the contracting officer. Our holding that the time limit is not jurisdictional eliminates the need for us to doubt the district court's conclusion. In any event, the distinction between jurisdictional requirements and claim-processing rules applies. *See Union Pacific*, 130 S. Ct. at 596-98 (applying the

The different treatment of claim-processing rules and jurisdictional requirements has significant effects on the scope of authority held by adjudicatory tribunals. Claim-processing rules "typically permit [tribunals] to toll the limitations period in light of special equitable considerations," *John R. Sand*, 552 U.S. at 133, and their protection can be "forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456; *see, e.g.*, *Eberhart v. United States*, 546 U.S. 12, 19, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005) (per curiam); *Wilburn v. Robinson*, 480 F.3d 1140, 1144-46, 375 U.S. App. D.C. 257 (D.C. Cir. 2007). But a tribunal "has no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), and litigants cannot by waiver or forfeiture confer jurisdiction where it is otherwise lacking, *see United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002); *S. Cal. Edison Co. v. FERC*, 603 F.3d 996, 1000, 390 U.S. App. D.C. 267 (D.C. Cir. 2010).

Whether a statutory time limit or other prerequisite to suit is jurisdictional is "discerned by looking to the condition's text, context, and relevant historical treatment." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1246, 176 L. Ed. 2d 18 (2010). We begin by considering whether Congress "clearly state[d]" the limitation should "rank . . . as jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). If so, our inquiry is over.

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distinction to rules governing adjudications by an administrative agency). We note, however, that generally "[a] defect in an agency's jurisdiction . . . does not affect the subject matter jurisdiction of the district court." *Mitchell v. Christopher*, 996 F.2d 375, 378, 302 U.S. App. D.C. 109 (D.C. Cir. 1993).

Id. at 515-16. If, on the other hand, the limitation "lacks a clear jurisdictional label," we then ask whether the structure of the statute or long-standing judicial precedent "compel[s] the conclusion that . . . it nonetheless impose[s] a jurisdictional limit." *Muchnick*, 130 S. Ct. at 1244.

The time limit for initiating a claim under the CDA is not stated in jurisdictional terms. Section 605(a) provides that all claims by a contractor "shall be in writing"; "shall be submitted to the contracting officer for a decision"; and "shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). The statute does not "refer in any way to . . jurisdiction," *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982), so we must turn to its structure and history.

The government asks the court to infer from the structure of the statutory regime for processing government contract claims that the limitations period in § 605(a) is jurisdictional. Specifically, the government argues that tolling the six-year deadline in § 605(a) would "undermine" 28 U.S.C. § 2501, Appellee's Br. at 25, which generally limits the jurisdiction of the Court of Federal Claims to claims filed within six years of their accrual. *John R. Sand*, 552 U.S. at 134-38. It is hard to see how. Section 2501 does not even apply to claims arising under the CDA, which instead gives contractors six years to file a claim with the contracting officer and one year to seek judicial review of the contracting officer's decision. *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987); *see also* 41 U.S.C. §§ 605(a), 609(a). Regardless of whether § 605(a) is tolled, a contractor may have more than six years after its claim accrues to file suit in the Court of Federal

Claims. *See Pathman*, 817 F.2d at 1574-75, 1580. The tolling of the limitations period in § 605(a) simply has no bearing on § 2501.

Likewise, the historical treatment of the type of limitation imposed by § 605(a) does not suggest that its six-year filing deadline is jurisdictional. In *John R. Sand & Gravel Co. v. United States* and *Bowles v. Russell* the Supreme Court recognized the general rule that time requirements do not affect subject-matter jurisdiction but concluded that the particular time limits at issue in those cases were jurisdictional based on their historical treatment. *See John R. Sand*, 552 U.S. at 134-38 (construing 28 U.S.C. § 2501); *Bowles*, 551 U.S. at 209-11 (interpreting 28 U.S.C. § 2107 and FED. R. APP. P. 4). In each case, the Court rested its decision on a line of Supreme Court precedent dating back more than a century. *John R. Sand*, 552 U.S. at 134 (citing *Kendall v. United States*, 107 U.S. 123, 2 S. Ct. 277, 27 L. Ed. 437, 18 Ct. Cl. 758 (1883)); Bowles, 551 U.S. at 210 (citing *United States v. Curry*, 47 U.S. (6 How.) 106, 12 L. Ed. 363 (1848)). Section 605(a) lacks a comparable lineage. Indeed, it was not until 1994 that Congress enacted any statute of limitations for submitting claims to contracting officers. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351, 108 Stat. at 3322. As originally enacted, the CDA contained no time limit on the filing of claims. Pub. L. No. 95-563, § 6(a), 92 Stat. 2383, 2384 (1978). Although government contracts sometimes specified how long the parties would have to submit their claims, *see* 41 U.S.C. § 605 note, these contractual deadlines were not considered jurisdictional, *see Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637 (Fed. Cir. 1989) (holding that failure to submit a timely claim is an "affirmative defense" that "does not oust a tribunal of jurisdiction");

cf. JACK PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 227-28 (1964) ("[I]f the contracting officer decides the contractor's claim on the merits without raising the issue of untimeliness of notice, the notice requirement is deemed waived.").

The government also makes a broader argument: that § 605(a) "run[s] for the benefit of the Government" and this type of time limit has "long been considered jurisdictional." Appellee's Br. at 13. The government has it precisely backwards. *Irwin v. Department of Veterans Affairs* established a "general rule" that time limits for suing the government are presumptively subject to equitable tolling, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), and therefore nonjurisdictional. The government's categorical argument that statutes of limitations running for the benefit of the Government are jurisdictional in nature lacks merit.

Finally, the government argues that the limitations period in § 605(a) is jurisdictional because it facilitates administrative review and promotes judicial efficiency. That may be so, but such virtues do not make the limitations period jurisdictional. Many time limitations—including claim-processing rules—serve "system-related goal[s] such as facilitating the administration of claims," *John R. Sand*, 552 U.S. at 133. A limitations period should not "be ranked as jurisdictional merely because it promotes important congressional objectives." *Muchnick*, 130 S. Ct. at 1248 n.9.

Because the time limit in § 605(a) is not jurisdictional in nature, the district court erred in dismissing Menominee's claims for lack of subject-matter jurisdiction. We may still affirm, however, if we conclude that the district court should have dismissed

for failure to state a claim. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997). Because Menominee failed to meet the filing deadline and the government has not waived or forfeited its defense of untimeliness, such a dismissal would be proper unless the limitations period can be tolled. We now turn to that question.

B. Class-Action Tolling

In *American Pipe & Construction Co. v. Utah*, the Supreme Court held "that the commencement of a class action" will in some cases "suspend[] the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). In this case we consider whether the time limit for filing an administrative claim should be tolled under *American Pipe* when filing that claim is a jurisdictional prerequisite to participation in the class action.

A party generally must exhaust administrative remedies before seeking relief in federal court. *See McCarthy v. Madigan*, 503 U.S. 140, 144-45, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992); *see also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638 (1938). That rule "applies to class actions," in which courts typically require "exhaustion by at least one member of the class." *Phillips v. Klassen*, 502 F.2d 362, 369, 163 U.S. App. D.C. 360 (D.C. Cir. 1974); *see, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). Where exhaustion is a jurisdictional requirement, however, every class member must exhaust its administrative remedies. *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d

699, 704-05, 388 U.S. App. D.C. 1 (D.C. Cir. 2009); *see, e.g., Weinberger v. Salfi*, 422 U.S. 749, 764, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

Menominee contends that the pendency of the *Cherokee* class action brought by other Indian tribes against the IHS tolled the limitations period in § 605(a) for all putative class members, including Menominee, under *American Pipe*. At the same time, Menominee acknowledges that it did not submit its claims to the contracting officer until after class certification was denied, and it concedes that the submission of such a claim is a jurisdictional prerequisite to judicial review. Appellant's Br. at 42 n.17.[3] It follows that Menominee should have been excluded from the *Cherokee* class, had one been certified,

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[3] The concession is well taken. The Federal Circuit and the Court of Claims have long held that the court may not exercise jurisdiction until the contracting officer either issues a decision on the claim or is deemed to have denied it. *See Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1578-79 & n.6 (Fed. Cir. 1994); *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971, 227 Ct. Cl. 176 (Ct. Cl. 1981) ("Absent this 'claim,' no 'decision' is possible and, hence, no basis for jurisdiction in this court."), *aff'd*, 230 Ct. Cl. 884 (1982). Their conclusion is confirmed by the structure of the CDA. By its plain terms, § 8(d) of the Act makes a decision by the contracting officer a jurisdictional prerequisite to review by the agency board of contract appeals. 41 U.S.C. § 607(d) (titled "Jurisdiction"). Section 10, which permits contractors to file a direct action in the Court of Federal Claims "in lieu of appealing the decision of the contracting officer . . to an agency board," *id.* § 609(a)(1), is not similarly framed in jurisdictional terms. Yet the jurisdiction of the agency boards and the court of claims are clearly coterminous. *See Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 750 (Fed. Cir. 1993). Because a decision from the contracting officer or a "deemed denial" of the claim is a prerequisite to the board's exercise of its jurisdiction, it is likewise necessary for the court to act.

because the tribe had not satisfied the jurisdictional exhaustion requirement. In arguing otherwise, the tribe relies on cases permitting class-action tolling of the administrative filing deadlines in Title VII and the Age Discrimination in Employment Act (ADEA). *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1392-93 (11th Cir. 1998) (en banc); *Griffin v. Singletary*, 17 F.3d 356, 359-61 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988). Those cases are inapposite, however, because neither Title VII nor the ADEA incorporates a jurisdictional exhaustion requirement. *See Zipes*, 455 U.S. at 395 n.11, 397. Also unhelpful is Menominee's citation to *McDonald v. Secretary of Health & Human Services*, 834 F.2d 1085 (1st Cir. 1987), in which all unnamed class members had already satisfied "the non-waivable jurisdictional requirement of having presented 'a claim for benefits . . . to the Secretary,'" *id.* at 1092 n.4 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). *Accord Arctic Slope*, 583 F.3d at 794 & n.1.

Menominee further argues that even if the *Cherokee* court could not have exercised jurisdiction over its claims, class-action tolling of the period for filing an administrative claim is nevertheless required. In keeping with this court's "functional reading of *American Pipe*," *McCarthy v. Kleindienst*, 562 F.2d 1269, 1274, 183 U.S. App. D.C. 321 (D.C. Cir. 1977), we consider whether tolling under these circumstances would serve the purposes underlying the class-action tolling doctrine. We hold that the limitations period for submitting an administrative claim is not tolled under *American Pipe* for asserted class members who, because of their failure to satisfy a jurisdictional exhaustion requirement, are ineligible

to participate in the class action at the time class certification is denied.

American Pipe addressed what effect, if any, the timely filing of a complaint on behalf of an asserted class should have on the statute of limitations governing the claims of absent class members—a problem that arises from the delay between the commencement of the action and the district court's determination "whether to certify the action as a class action" and how to "define the class and the class claims." FED. R. CIV. P. 23(c)(1)(B). If the statute of limitations on the claims of putative class members continued to run in the meantime, the unnamed plaintiffs would face a choice: act to preserve their rights (by moving to intervene or join or by initiating a separate action) or run the risk of forfeiting their rights if class certification is denied after their claims have grown stale. The *American Pipe* Court held that, where a class is certified, the commencement of the action by the named plaintiff satisfies the statute of limitations "as to all those who might subsequently participate in the suit." 414 U.S. at 551. If certification is denied, then the limitations period is suspended between the filing of the class complaint and the denial of class status. *Id.* at 554. The tolling rule of *American Pipe* permits members of the asserted class to safely await the certification decision before filing a motion to intervene in the action brought by the named plaintiff, *id.*, or a separate lawsuit, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983).

A contrary rule would defeat Rule 23's objectives of "efficiency and economy of litigation" by forcing putative class members to file protective motions to intervene in the pending action or run the risk of their

claims growing stale. *American Pipe*, 414 U.S. at 553. "[R]equiring successful anticipation of the determination of the validity of the class would breed needless duplication of motions," the Court explained, because that determination in some cases turns on "such subtle factors as experience with prior similar litigation or the current status of a court's docket." *Id.* at 553-54. The need for class-action tolling thus rests on the uncertainty of putative class members regarding whether the court will certify a class that will protect their interests. If putative class members knew in advance that a class would not be certified or that they would be excluded from the class action, there would be no need for tolling.

We agree with the Federal Circuit that the *American Pipe* doctrine does not require courts to toll the time putative class members have to satisfy a jurisdictional prerequisite to judicial review when the failure to do so precludes them from obtaining relief via the class action. *See Arctic Slope*, 583 F.3d at 797. Until they satisfy the jurisdictional preconditions to class membership, putative class members have no reason to anticipate whether or not class certification will be granted and face none of the uncertainty class-action tolling is meant to ameliorate. Regardless of whether certification is granted, every contractor must submit its claim to the contracting officer. Only once a contractor's claim is denied by the contracting officer does the contractor have a choice between participating in the class or proceeding individually—the choice with which the class-action tolling doctrine is concerned. Because Menominee could not have participated in the Cherokee class action without first presenting a claim to the contracting officer, the purposes of Rule 23 would not be advanced by tolling the limitations period in § 605(a). "Where the rationale

for a rule stops, so ordinarily does the rule." *United States v. Textron Inc.*, 577 F.3d 21, 31 (1st Cir. 2009) (Boudin, J.).

Menominee contends that extending class-action tolling to the time limitation in § 605(a) would advance the goal of "efficiency and economy of litigation" described by the Court in *American Pipe*, 414 U.S. at 553. Unless tolling applies, Menominee asserts, contractors will be forced to file claims with the contracting officer "merely to preserve their rights to participate in [a] proposed class [action]." Appellant's Br. at 17. Yes and no. It is true that contractors must file administrative claims in order to participate in a class action brought under the CDA. But every asserted class member must submit a claim to the contracting officer because of the general rule that one cannot obtain relief as a member of a class action without first satisfying the jurisdictional prerequisites to judicial review, not because class-action tolling is inapplicable to § 605(a). Menominee also suggests that, under our rule, contractors that submit claims to the contracting officer must then file individual actions or motions to intervene within twelve months of the contracting officer's decision. This argument fails, too. The tribe would be correct if the time limit for seeking judicial review in § 609 were not subject to tolling under *American Pipe*, but nothing in our decision precludes application of class-action tolling to that deadline.

Menominee further argues that the district court in *Cherokee* "conclusively decided the parameters of the putative class[,] . . . that the Tribe was a member of that class," and that the issue "cannot be re-litigated." Reply Br. at 4-5 & n.1. That argument has no merit. The *Cherokee* court denied class certification and

therefore never defined a class. *See* FED. R. CIV. P. 23(c)(1)(B).

Finally, Menominee contends that class-action tolling should apply here because the tribe's failure to present a timely claim resulted from its reliance upon the *Cherokee* class action and arguments the government allegedly made in the course of that litigation. *See* Appellant's Br. at 17; Reply Br. at 6. But Menominee's purported reliance on the pendency of the class action is not germane to the availability of class-action tolling, which benefits even those "asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings." *American Pipe*, 414 U.S. at 552. The various defenses raised by the government in the *Cherokee* litigation similarly have no bearing on the availability of class-action tolling.

In sum, Menominee advocates extending the benefit of tolling to all members of the class described by the named plaintiff, including those jurisdictionally barred from participation due to their failure to exhaust administrative remedies. Such a rule would serve only one function: Permitting plaintiffs who could not have participated in the class to initiate actions against the government after their claims have grown stale. Adopting the rule Menominee advances would not further the objectives of Rule 23 but rather "invit[e] abuse" of the class device by encouraging lawyers "to frame their pleadings . . . [to] save members of the purported class who have slept on their rights." *Crown, Cork & Seal*, 462 U.S. at 354 (Powell, J., concurring) (quoting *American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring)) (internal quotation marks omitted). We join the Federal Circuit

in holding that class-action tolling is not available under these circumstances.

C. Equitable Tolling

In the alternative, Menominee argues that the CDA's six-year limitations period should be equitably tolled. We agree that the statute is subject to tolling and remand for the district court to consider whether tolling is appropriate in this case.

"It is hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) (internal citations and quotation marks omitted). Indeed "a nonjurisdictional federal statute of limitations is normally subject to a rebuttable presumption in favor of equitable tolling." *Holland v. Florida*, 130 S. Ct. 2549, ___,177 L. Ed. 2d 130, 144 (2010) (slip op. at 13) (internal quotation marks omitted). That presumption applies in litigation against the United States, *Irwin*, 498 U.S. at 95, where "the injury to be redressed is of a type familiar to private litigation," *Chung v. DOJ*, 333 F.3d 273, 277, 357 U.S. App. D.C. 152 (D.C. Cir. 2003). Because the time limitation in § 605(a) is nonjurisdictional and actions for breach of contract are familiar to private litigation, we must presume that § 605(a) is subject to equitable tolling. The only question that remains is whether there is "good reason to believe that Congress did not want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997).

The requirement that all claims "shall be submitted within 6 years after the accrual of the claim," 41 U.S.C. § 605(a), reads like a run-of-the-mill statute of

limitations. Because this provision was enacted after *Irwin* established the presumption in favor of equitable tolling, Congress was on notice that courts would read § 605(a) to permit tolling unless it provided otherwise. *See Holland*, 130 S. Ct. at 143 (slip op. at 13) "The presumption's strength is . . . reinforced by the fact that Congress enacted [the statute] after th[e] Court decided *Irwin* . . . ."). Yet Congress included no "[s]pecific statutory language" that could be construed to "rebut the presumption." *John R. Sand*, 552 U.S. at 137-38. That silence is a strong indication that *Irwin*'s default rule governs. *Arctic Slope*, 583 F.3d at 798.

The government argues that § 605(a) is much like the statute at issue in *United States v. Brockamp*, in which the Supreme Court held that the *Irwin* presumption had been rebutted even though Congress had not expressly precluded tolling. *Brockamp* involved the time limitation for filing claims for tax refunds. *See* 26 U.S.C. § 6511. In holding that Congress did not want the deadline equitably tolled, the Court relied on several factors including the provision's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions," 519 U.S. at 352, as well as its "unusually emphatic form," *id.* at 350, and the "underlying subject matter" of tax collection, *id.* at 352. None of these factors is at work in § 605(a).

The government describes the CDA as "a detailed, technical, complex scheme that sets forth precise procedures and deadlines for the assertion of a claim." Appellee's Br. at 31. Be that as it may, the government's focus on the regulatory scheme as a whole is misplaced. The *Brockamp* Court did not concern itself with the complexity of the Tax Code taken as a whole,

but the complexity of the time limitations found in § 6511. *See* 519 U.S. at 350-51. As Irwin itself illustrates, a fairly complicated regulatory scheme—in that case Title VII—may nevertheless include a limitations period that uses "fairly simple language, which one can . . . plausibly read as containing an implied 'equitable tolling' exception." *Id.* at 350. As the Federal Circuit observed, "[t]he statutory time limitation of section 605(a) is a simple provision and does not contain technical language." *Arctic Slope*, 583 F.3d at 799.

The *Brockamp* Court also drew on the several "explicit exceptions to [the] basic time limits" in § 6511 to conclude that it would be inappropriate to allow equitable tolling. 519 U.S. at 351. Section 605(a) is similar, the government asserts, in that it expressly states that its limitations period does not apply "to a claim by the government against a contractor that is based on a claim by the contractor involving fraud." 41 U.S.C. § 605(a). But this exception is easily explained in a way that does not require us to infer that Congress meant to preclude equitable tolling. When Congress amended § 605(a) to add the limitation period, § 604 already imposed a deadline on the government for claims involving fraud. That deadline specifies that "[l]iability . . . shall be determined within six years of the commission of [the contractor's] misrepresentation of fact or fraud." 41 U.S.C. § 604. In excepting claims involving fraud from the limitations period in § 605(a), Congress presumably meant only to avoid implicitly abrogating § 604. There is no reason to think that the inclusion of an express exception for

claims involving fraud should be read to exclude an implicit exception for equitable tolling.[4]

We agree with the Federal Circuit that the time limitation in § 605(a) is subject to equitable tolling. Because the parties dispute facts relevant to application of the equitable tolling doctrine, we remand for the district court to determine whether tolling is appropriate under the circumstances of this case.

III.

Neither party suggests that Menominee's claim for 1995 is subject to the CDA's six-year time limit, which is inapplicable to "contracts awarded prior to October 1, 1995." 48 C.F.R. § 33.206. The district court still dismissed Menominee's claim for 1995, but it did so based on the doctrine of laches.

The equitable defense of laches "is designed to promote diligence and prevent enforcement of stale claims" by those who have "'slumber[ed] on their rights.'" *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843, 224 U.S. App. D.C. 272 (D.C. Cir. 1982) (quoting *Powell v. Zuckert*, 366 F.2d 634, 636, 125 U.S. App. D.C. 55 (D.C. Cir. 1966)). Laches "applies where there is '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 882, 385 U.S. App. D.C. 417 (D.C. Cir. 2009) (quoting *Nat'l R.R.*

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[4] The government also argues that tolling the limitations period in § 605(a) would undermine the statute of limitations for filing actions in the Court of Federal Claims, 28 U.S.C. § 2501, which cannot be equitably tolled, *John R. Sand*, 552 U.S. at 137. The government offered a substantially similar argument in favor of treating the limitations period as jurisdictional, and we reject the argument here for the same reasons. *See supra*, at 9.

Passenger Corp. v. Morgan, 536 U.S. 101, 121-22, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). The district court stated that Menominee's "11-year delay in bringing suit is nearly double the time allowed under the statute of limitations and is certainly long enough to satisfy the standards under the first prong of the test for laches." *Menominee*, 539 F. Supp. 2d at 154. The court also explained that this delay prejudiced the government because "[f]unding for the 1995 contract year has long since expired." *Id.*

The parties dispute the applicable standard of review. Menominee urges us to review the dismissal de novo, and the government advocates review under an abuse-of-discretion standard. We have observed that "both standards are relevant" when the district court's laches determination comes at summary judgment, *Harjo*, 565 F.3d at 883, but have not addressed the standard that governs in an appeal from a dismissal. We need not determine here whether our review should be de novo or for abuse of discretion because we would reverse under either standard. With the following observations, we remand for the district court to reconsider the matter.

First, the district court incorrectly calculated the length of the tribe's delay. As the government now acknowledges, the tribe submitted its claim for 1995 "nine years and nine months after the claims accrued," Appellee's Br. at 43, not the eleven years suggested by the district court. *Cf. Gull Airborne*, 694 F.2d at 843 (stating that the plaintiff's delay should be measured by the "period of time [that] elapses between accrual of the claim and suit").

Second, the district court erred in failing to consider the tribe's arguments that its delay was reasonable. "[L]aches is not, like limitation, a mere matter of

time," *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S. Ct. 582, 90 L. Ed. 743 (1946), but "attaches only to parties who have *unjustifiably* delayed in bringing suit." *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 49, 367 U.S. App. D.C. 276 (D.C. Cir. 2005) (per curiam) (emphasis added). The doctrine is equitable in nature, and its application "turns on whether the party seeking relief 'delayed inexcusably or unreasonably in filing suit,'" not simply whether the party delayed. *Id.* (quoting *Rozen v. District of Columbia*, 702 F.2d 1202, 1203, 227 U.S. App. D.C. 14 (D.C. Cir. 1983) (per curiam)). On remand, the district court should consider Menominee's arguments that it had good reason for not presenting its claims to the contracting officer sooner.

Third, the district court provided inadequate reasons for concluding that Menominee's delay prejudiced the government. The court offered only the terse observation that "[f]unding for the 1995 contract year has long since expired." *Menominee*, 539 F. Supp. 2d at 154. This statement appears to be an endorsement of the government's assertion in its motion to dismiss that it was "economically prejudiced" by the delay because "the appropriations for 1995 have long since lapsed." Mot. to Dismiss at 9. In support of that position, the government cited the Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499 (1994), which provided that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein," *id.* § 304, 108 Stat. at 2536. The 1995 fiscal year ended on September 30, 1995. *Id.* pmbl., 108 Stat. at 2499. Because Menominee's claim for 1995 did not accrue until several months later, the relevant appropriations

would have already expired had the tribe filed suit on the day its claim accrued. We fail to see how the tribe's delay prejudiced the government.

We close by noting that "a motion to dismiss generally is not a useful vehicle for raising the issue [of laches]." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277, at 644 (3d ed. 2004). *But see, e.g.*, *Love v. Stevens*, 207 F.2d 32, 32, 93 U.S. App. D.C. 69 (D.C. Cir. 1953) (per curiam) (affirming a dismissal based "upon plaintiff's laches"). Laches may be the "legal cousin" of the statute of limitations, *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 448, 309 U.S. App. D.C. 186 (D.C. Cir. 1994) (Wald, J., dissenting), but it "involves more than the mere lapse of time and depends largely upon questions of fact." WRIGHT & MILLER § 1277, at 643. "[A] complaint seldom will disclose undisputed facts clearly establishing the defense." *Id.* at 643-44.

IV.

The dismissal of Menominee's claims is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 07-812 (RMC)

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

March 14, 2008, Decided

MEMORANDUM OPINION

Judges: ROSEMARY M. COLLYER, United States District Judge.

Opinion by: ROSEMARY M. COLLYER

The Menominee Indian Tribe of Wisconsin ("Tribe") operates a health care system for tribal members pursuant to a self-determination contract with the Secretary of the Department of Health and Human Services ("HHS" or "Secretary"). The Tribe sues HHS for alleged breach of contract in the years 1995 through 2004. The Tribe alleges that HHS failed to compensate it fully for indirect contract support costs ("CSC"), despite clear contractual and statutory language in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, *et seq*. ("ISDA"), to the contrary. HHS insists that it negotiated specific amounts for indirect contract support

costs with the Tribe for each year in question and paid those amounts. It asks that the Complaint be dismissed. *See* Dkt. # 6. The Motion will be granted in part and denied in part.

A. Claims Related to 1996 through 1998 CSC Funding are Time-Barred

The Contract Disputes Act ("CDA") governs Plaintiff's claims. *See* 25 U.S.C. § 450m-1(d); 41 U.S.C. § 605(a). The CDA is a waiver of sovereign immunity and the time limitations found therein operate as a condition on that waiver. *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996). Statutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them. *Bowles v. Russell*, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96 (2007).

In 1994, Congress enacted a six-year statute of limitations for Contract Dispute Act claims. 41 U.S.C. § 605(a) ("Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim."). Because the Tribe did not raise claims related to its 1996 through 1998 CSC funding within six years of their accrual,[1] these claims must be dismissed for lack

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[1] The Tribe's claims under the 1996 contract accrued by no later than the end of December 1996, and the statute of limitations on these claims expired by the end of December 2002. Plaintiff's claims under the 1997 contract accrued by the end of December 1997, and the statute of limitations on these claims expired by the end of December 2003. Finally, Plaintiff's claims under the 1998 contract accrued by the end of December 1998, and the statute of limitations on these claims expired by the end of December 2004. By its own admission, the Tribe did not submit any of its claims for contract years 1996-98 to the contracting officer until September 7, 2005. *See* Compl. P 8.

of subject matter jurisdiction.[2]

B. Claims Related to 1995 CSC Funding are Barred by Laches[3]

"Laches applies where there has been an unfair and prejudicial delay by a plaintiff in bringing an action." *CarrAmerica Realty Corp. v. Kaidanow*, 355 U.S. App. D.C. 180, 321 F.3d 165, 171 (D.C. Cir 2003). Laches applies when there is: (1) a lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting the defense. *Pro-Football, Inc. v. Harjo*, 367 U.S. App. D.C. 276, 415 F.3d 44, 47 (D.C. Cir. 2005) (citing *AMTRAK v. Morgan*, 536 U.S. 101, 121-22, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). Both of those elements are met here.

First, the Tribe's cause of action accrued by December 1995 at the latest, when the contract year ended and the Tribe had not been fully paid under the contract. This 11-year delay in bringing suit is nearly double the time allowed under the statute of limitations and is certainly long enough to meet the standards under the first prong of the test for laches.

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[2] The Court is not persuaded by the Tribe's tolling arguments. *See* Pl.'s Opp'n at 30-43. HN3 Administrative presentment to the contracting officer is a mandatory jurisdictional requirement, *see Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1106 (D.N.M. 2006), and was not timely performed by the Tribe for its 1996-1998 claims. Because federal court jurisdiction cannot attach until there has been administrative presentment, tolling does not apply. *See NuFarm Am., Inc. v. United States*, 398 F. Supp. 2d 1338, 1353-54, 29 Ct. Int'l Trade 1317 (Ct. Int'l Trade 2005).

[3] Arguably, the CDA statute of limitations does not apply to the Tribe's 1995 contract because it was signed prior to the passage of the CDA statute of limitations.

See, e.g., Mexican Intermodal Equip., S.A. v. United States, 61 Fed. Cl. 55, 71 (2004).

Second, the Court believes that the Secretary has been prejudiced by the Tribe's delay. *See A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992) (laches applies when delay causes economic prejudice or injury to defendant's ability to mount a defense). Funding for the 1995 contract year has long since expired and the Tribe "slumber[ed] on its rights" by waiting 11 years to file suit. *See Pro-Football, Inc.*, 415 F.3d at 47. Accordingly, the Court will dismiss any claims related to 1995 CSC funding.

C. Claims Related to 1999 through 2004 CSC Funding Survive Defendants' Motion to Dismiss

In his brief, the Secretary asserts that "ISDA does not mandate the payment of a specific amount of indirect CSC," Def.'s Mem. at 16, and "[i]t is the contracts themselves that create an entitlement to CSC." *Id.* at 17. These statements represent a very troubling misapprehension of the statute. ISDA mandates the payment of full indirect CSC and ISDA itself establishes that entitlement. *Ramah Navajo Sch. Bd., Inc., v. Babbitt*, 318 U.S. App. D.C. 329, 87 F.3d 1338, 1341 (D.C. Cir. 1996) ("[T]he [ISDA] requires the Secretary to allocate certain Contract Support Funds to cover the full administrative costs the Tribe will incur . . . . [and] which the statute refers to as an entitlement of the contracting Tribes." (citing 25 U.S.C. § 450j-1(g) ("The Secretary shall add to the contract the full amount of funds to which the contractor [the Tribe] is *entitled* under subsection (a).")). The Secretary is not free to negotiate hard and require the Tribe to accept less than full funding if, as seems likely, the Secretary has more money available.

See Def.'s Mem. at 18 n.6 ("because IHS has already obligated all but minor amounts of the capped funds" for the years between 1998 and 2004, "no additional CSC funding can be awarded to Plaintiff for those years"). Although the Secretary cannot disburse funds he does not have or amounts in excess of limitations set by Congress, he still has the obligation to fund indirect CSC to the greatest extent possible inasmuch as the statutory promise is full funding.

The Secretary relies on the negotiated terms and his full payment accordingly and does not seem to appreciate his statutory obligations to fully fund indirect CSC insofar as possible. No information is provided to the Court concerning how the Secretary "follow[ed] as closely as possible the allocation plan Congress designed," *Ramah Navajo Sch. Bd.*, 87 F.3d at 1345, when there were insufficient appropriations to allow full funding. Accordingly, Defendants' Motion to Dismiss will be denied as it relates to 1998 through 2004 CSC funding.

A memorializing order accompanies this Memorandum Opinion.

/s/

ROSEMARY M. COLLYER
United States District Judge

Date: March 14, 2008

ORDER

For the reasons stated in the Memorandum Opinion filed separately and contemporaneously herewith, it is hereby

ORDERED that Defendants' Motion to Dismiss [Dkt. # 6] is GRANTED as it relates to 1995 through 1998 CSC funding; and it is

FURTHER ORDERED that Defendants' Motion to Dismiss [Dkt. # 6] is DENIED as it relates to 1998 through 2004 CSC funding.

SO ORDERED.

/s/

ROSEMARY M. COLLYER
United States District Judge

Date: March 14, 2008

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2011-1485

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

November 9, 2012, Decided

OPINION

Judges: Before BRYSON, MAYER and REYNA, *Circuit Judges*. Opinion for the court filed by Circuit Judge REYNA. Dissenting opinion filed by Circuit Judge BRYSON.

Opinion by: REYNA

Reyna, *Circuit Judge*.

Arctic Slope Native Association, Ltd., ("ASNA") appeals a decision of the Civilian Board of Contract Appeals ("Board") dismissing ASNA's breach-of-contract claim under the Contract Disputes Act ("CDA") as time-barred. Because the CDA's six-year statute of limitations should have been equitably tolled, we reverse and remand.

I

ASNA is an inter-tribal consortium of seven federally recognized tribes situated across the North Slope of Alaska. In fiscal years 1996, 1997, and 1998, ASNA contracted with the Department of Health and Human Services, Indian Health Service ("IHS") pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA") to operate a hospital in Barrow, Alaska. ISDA, as amended, requires the government to pay tribal contractors' contract support costs,[1] *i.e.*, costs that a federal agency would not have incurred but which the tribes reasonably incur in managing the programs. When the government refused to pay the full contract support costs sought by the tribes, the tribes sued.

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[1] 25 U.S.C. § 450j-1(a)(2): "There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—(A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract."

25 U.S.C. § 450j-1(a)(3)(A): "The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of— (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under section 106(a)(1) [subsec. (a)(1) of this section]."

A. Legal Landscape

In 1990, the Ramah Navajo Chapter filed a class action in federal district court in New Mexico to recover damages for the underpayment of contract support costs. *See Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). *Ramah* challenged the government's methodology used to determine the applicable contract support costs. The issue of exhaustion of administrative remedies arose at the outset of the litigation. The government argued that the claims of the class were not typical because while the class representative had exhausted its administrative remedies, there was no showing that other class members had done so. According to the government, "the theory is that the exhaustion of administrative remedies is jurisdictional and that if the remedies have not been exhausted, the Court's action regarding the class would be without jurisdiction." J.A. 137.

In 1993, Judge Hanson of the District Court of New Mexico rejected the Government's exhaustion of administrative remedies argument and certified the class. He explained:

> Plaintiff's action does not concern a typical contract dispute wherein issues of performance need be addressed. If that were the case, the purposes behind exhaustion of administrative remedies would require that the contract claim first be brought to the attention of an agency contracting officer. Instead, Plaintiff's action challenges the policies and practices adopted by the BIA as being contrary to the law and seeks to make systemwide reforms. In such a case as this, exhaustion of administrative remedies is not

> required. In light of the above, it *is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act*. J.A. 319 (emphasis added).[2] ASNA was a class member in *Ramah* and received funds flowing from a partial settlement of that litigation. Like the plaintiffs in *Ramah*, ASNA challenged the agency's practices and procedures concerning payout of support costs.

In the second class action—*Cherokee Nation of Oklahoma v. United States*—the court denied class certification in February 2001 because typicality, commonality, and adequate representation were not met since the contracts differed by tribe. 199 F.R.D. 357, 362 (E.D. Okla. 2001). This action concerned IHS's refusal to pay tribes the full contract support costs because of an alleged lack of available appropriations and the class, as described, would have included contractors, like ASNA, who had not yet presented claims to the contracting officer. Specifically, it sought certification of a class including "all Indian tribes and tribal organizations operating [Indian Health Service] programs . . . authorized by the [ISDA] . . . that were not fully paid their contract support costs needs, as determined by [the Indian Heath Service], at any time between 1988 and the

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[2] On December 6, 2002, prior to the expiration of ASNA's claims in the Zuni litigation with respect to fiscal years 1996, 1997, and 1998, the *Ramah* court entered an order noting that the government would resist class certification on at least one of the new claims and that "decertification of [both claims] is a possibility." *Ramah Navajo Chapter v. Babbitt*, 250 F. Supp. 2d 1303, 1308 (D.N.M. 2002). The same decision also stated that "[a] number of decisions have been announced . which are harmful to the Class'[s] claims." *Id.*

present." *Id.* at 360. The court later ruled on the merits, and the merits decision, not the denial of class certification, was appealed to the U.S. Supreme Court, which rendered a decision on March 1, 2005. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005). In reaching this conclusion, the court did not discuss or rely upon the fact that some tribes had exhausted their remedies while others had not.

A third class action—*Pueblo of Zuni v. United States*—was filed on September 10, 2001, in the District Court of New Mexico and assigned to Judge Hanson, the same judge who had granted class certification in *Ramah*. 467 F Supp. 2d 1099, 1105 (D.N.M. 2006). The complaint claimed that IHS improperly calculated contract support costs, as alleged in *Ramah*, and failed to pay the full amount owed, as alleged in *Cherokee*. *Zuni* sought to certify a class of "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." *Id.*

In December 2001, before Zuni moved for class certification, the proceedings in *Zuni* were stayed pending the conclusion of the appellate proceedings in *Cherokee*. *Zuni* was then transferred to a different judge. After the stay was lifted, the government moved to dismiss a portion of the claims at issue in *Zuni* because the tribe had not first submitted all of its claims to the contracting officer. The district court granted the motion. *Zuni*, 467 F. Supp. 2d at 1112. The court rejected Zuni's purported reliance upon the 1993 certification order in *Ramah* as justifying its failure to exhaust its administrative remedies, noting that "Plaintiff can hardly be said to rely on the oblique argument that a class certification order in a separate

case allows Plaintiff to forego exhaustion of their claims in this case." *Id.* at 1114.

In May 2007, the district court denied Zuni's motion for class certification because "exhaustion under the CDA is mandatory and jurisdictional" and "the existence of unexhausted claims within the claims of the putative class remains a jurisdictional defect, precluding class certification." *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 442-43 (D.N.M. 2007). According to the district court, "[t]here is no legal basis for a waiver of this requirement for Plaintiff or any putative class member, given the express mandate for presentment with the statutory language." *Id.* The district court also found that "[t]he terms and conditions of the tribal contracts were sufficiently individualized so that the question of whether all tribal contractors were underpaid becomes one of the disputed issues," *id.* at 448, and that "[t]he nature of this kind of case with individualized contracts does not lend itself to class litigation." *Id.* at 446.

B. Procedural History

ASNA contends that it was a putative class member in the foregoing class actions even though it did not individually present its claims in writing to the contracting officer within the CDA's six-year statute of limitations. As will be discussed in more detail below, the Federal Circuit ultimately held that the ISDA was subject to equitable tolling, but not statutory class action tolling, and remanded the case to the Board to determine if the statute of limitations should be equitably tolled as to ASNA. The Board found that ASNA did not satisfy the equitable tolling criteria. Whether the Board erred in that determination is the narrow question presented in this appeal.

On September 30, 2005, after the Supreme Court issued its decision in *Cherokee* and while the *Zuni* class action was pending, ASNA presented its CDA claims to the IHS contracting officer. It is undisputed that, absent equitable tolling, these claims had each expired as of the date of their presentment to the contracting officer.

In its letter to IHS, ASNA argued that IHS failed to meet its contractual and statutory obligations in two ways. First, it failed to pay the full amount of ASNA's contract support costs. Second, it failed to include in the calculation of those costs the full indirect contract support costs by employing the same illegal calculation methodology that was struck down in *Ramah*. ASNA presented arguments to the IHS that were similar to the underpayment arguments it made to the court in *Ramah* and *Zuni*.

On August 21, 2006—almost a year before the district court denied the motion for class certification in *Zuni*—ASNA filed a complaint with the Board, alleging IHS's failure to pay the full contract support costs and to calculate the costs correctly. The Board dismissed ASNA's claims as time-barred, reasoning:

> ASNA's failure to submit its FY 1996 through FY 1998 claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA deprives this Board of jurisdiction to consider the claims. We cannot suspend the running of the six-year time limit any more than we could suspend the requirements, also found in section 605 that a claim must be submitted to the contracting officer, that a claim must be submitted in writing, and that a claim in excess of $100,000 must be certified. In the

> absence of a claim which meets all the requirements of section 605, we lack jurisdiction to consider an appeal. J.A. 32.

ASNA appealed the Board's decision to the Federal Circuit. We affirmed the Board's decision regarding statutory class action tolling but held that equitable tolling is available for claims brought under § 605(a) of the CDA. We remanded the case to the Board for a determination as to whether equitable tolling applied to ASNA.

On remand, a Majority of the Board found on June 9, 2011 that ASNA had not met the criteria for equitable tolling after reading *Cherokee* as requiring it to treat ASNA as a contractor and the contract as an ordinary procurement contract.[3] In reaching this conclusion, the Board observed that prior to 1994, no statute of limitations applied to the presentment of claims to the contracting officer. Specifically, the six-year statute of limitations took effect in 1994, one year *after* the district court granted class certification in *Ramah*. Second, although the Supreme Court had justified equitable tolling where a defective pleading was involved, the complaint in *Zuni* was not defective. Indeed, the district court did not dismiss the *Zuni* complaint, and class members that had complied with the presentment requirement could continue to litigate the claims set forth therein. The Majority of the Board reasoned that since ASNA did not take the actions required to be considered a purported class member—*i.e.*, timely present its claims to the contracting officer—then equitable tolling did not

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[3] It is worth noting that the Majority's interpretation of *Cherokee* was issued almost five years after ASNA filed its claims with the CDA in August 2006.

apply. According to the Majority, ASNA had a responsibility to investigate the applicable legal landscape in pursuing its claims and to make an independent and reasoned decision, rather than relying upon Judge Hanson's court order. The Majority pointed out that ASNA had not established that the conduct of its adversary caused it to miss the statutory deadlines and determined that ASNA's decision could not turn on the presumed litigation position of an opposing party.

The Majority was unconvinced by ASNA's argument that the special relationship between the government and Indian tribes warranted application of equitable tolling. As the Majority explained, "[t]he canon that statutes should be interpreted for the benefit of the tribe does not mean that a statute should be interpreted in a manner divorced from the statute's text and purpose." ASNA App. 11a (citing *U.S. v. Tohono O'odham Nation*, 131 S. Ct. 1723, 179 L. Ed. 2d 723 (2011)). The Majority reasoned that recognition of tribes' special status simply requires construing ambiguous language in their favor, not ignoring the meaning and import of clear statutory language. In distinguishing the veterans' cases relied upon by ASNA for its assertion that equitable tolling was warranted given its special relationship with the government, the Majority noted that ASNA had competent and capable counsel throughout the litigation whereas many veterans proceed *pro se*. ASNA App. 13a.

In her dissent, Judge Steel wrote that the case should be resolved in ASNA's favor given the special relationship between the government and Indian tribes, the canon of construing the ISDA liberally, and the pertinent language of the statute and contracts.

This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(10).

II

Because we have already determined that equitable tolling may apply under § 605 of the CDA, the narrow question presented in this appeal is whether the six-year statute of limitations should have been equitably tolled as to ASNA given the unique circumstances of the case. *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785, 798 (Fed. Cir. 2009) ("ASNA I").

A. Standard of Review

Where, as here, the facts are undisputed, a determination of whether the criteria for equitable tolling have been met presents a question of law that we review *de novo*. 41 U.S.C. § 7107(b); *Former Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004).

B. ISDA and the CDA

Prior to 1988, the ISDA did not require the government to pay the administrative costs that the tribes incurred to operate the covered programs. *ASNA I*, 583 F.3d at 788. The 1988 amendments to the ISDA required the government, instead of contractors, to provide funds to pay the administrative expenses of covered programs. *Id.* (citing statutory amendments). The ISDA amendments made the CDA applicable to disputes concerning self-determination contracts. 25 U.S.C. § 450m-1(d). As a result, ISDA self-determination contractors can appeal an adverse decision by a contracting officer on contract disputes to the Civilian Board of Contract Appeals, *see* 41 U.S.C. § 606, or to the Court of Federal Claims. *See* 41 U.S.C. § 609(a)(1). In addition, the ISDA permits

contractors to bring claims in district courts, an avenue of relief that is generally unavailable to government contractors under the CDA. *ASNA I*, 583 F.3d at 789 (citing 25 U.S.C. § 450m-1(a)).

In claims between the government and contractors, the federal regulations discussing the CDA defines "claim" as a written demand or assertion by one of the contracting parties seeking the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. 48 C.F.R. § 2.101. While a "claim" need not use particular language to satisfy CDA requirements, the contractor must submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. *SITCO Gen. Trading and Contracting Co. v. U.S.*, 87 Fed. Cl. 506, 508 (Fed. Cl. 2009) (citing *Contract Cleaning Maint. Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). The CDA requires a contractor to present the written claim to the contracting officer within six years of a claim's accrual before bringing suit. 41 U.S.C. § 7103(a). The six-year statute of limitations at issue here was implemented in 1994 when Congress passed the Federal Acquisition Streamlining Act. Prior to 1994, no statute of limitations applied to the presentment of claims to a contracting officer.

C. Equitable Tolling

Equitable tolling hinges upon the particular equities of the facts and circumstances presented in each case. *See ASNA I*, 583 F.3d at 798, 800. It "permits courts to modify a statutory time limit and 'extend equitable relief' when appropriate." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). Equitable tolling applies where the litigant

proves: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2553, 177 L. Ed. 2d 130 (2010). The exercise of equity powers must be made on a case-by-case basis, *id.* at 2564, and equitable relief is typically extended only sparingly. *See Cloer v. Sec'y of Health & Human Servs.*, 654 F.3d 1322, 1344-45 (Fed. Cir. 2011) (en banc). Equitable tolling does not apply to garden variety claims of excusable neglect, such as an attorney miscalculation leading to a missed deadline. *Holland*, 130 S. Ct. at 2564.

D. Analysis

ASNA argues that equitable tolling should apply because it did not sleep on its rights and it reasonably relied upon the *Zuni* class action as well as its reasonable interpretation of the then-existing legal landscape to conclude that it need not present its claims to the contracting officer or file its own civil suit in order to preserve its claims.

The government counters that ASNA failed to take timely action to diligently pursue its rights and that no extraordinary circumstance prevented it rom doing so. According to the government, ASNA's reliance on *Ramah* was misplaced because the CDA's six-year statute of limitations was not in effect when the district court granted class certification in *Ramah*, and the claims in *Ramah* substantially differed from ASNA's claims. The government argues that it was foreseeable that the *Zuni* class might be denied certification, especially since the proposed class in *Cherokee* (involving claims nearly identical to ASNA's), was not certified, and the district court in *Ramah* inferred that decertification was possible in

light of the new cost claims added to *Ramah* after class certification was granted as to the calculation methodology claim. The government contends that there was no change in the law because the grant of class certification in *Ramah* hinged upon the fact that the case challenged system-wide policies and practices, and therefore, did not concern a typical contract case. The government argues that ASNA was aware of the pertinent legal landscape because ASNA's President "was kept informed of general litigation activities concerning contract support costs, including activities in ongoing class action lawsuits." J.A. 436.

We agree with ASNA that equitable tolling should apply and remand to the Board for proceedings consistent with this opinion.[4] There is no dispute that ASNA relied on the *Ramah*, *Cherokee*, and *Zuni* litigation in deciding that it was not required to present its claims to the contracting officer within the six-year limitations period. The critical questions are whether ASNA pursued its rights diligently even though it did not present and whether its reliance on the then-existing legal landscape in deciding not to present constituted an "extraordinary circumstance" sufficient to warrant equitable tolling of the filing deadline.

Here, the *Zuni* complaint was filed on behalf of "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." The parties agree that ASNA was such a

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[4] We are not bound by and therefore decline to follow the reasoning recently employed by a district court in a similar case. *See Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99, 2012 U.S. Dist. LEXIS 8108 (D.D.C. Jan. 24, 2012) (refusing to [**19] apply equitable tolling).

tribe and had contracted with the ISDA during that period. The *Zuni* complaint sought damages for contract support underpayments and defective cost calculation methodology—the same claims ASNA wished to assert. The class certification description did not mention exhaustion of administrative remedies. *Zuni* was assigned to the same judge in the same district court that had certified a similar class in *Ramah* in 1993 involving the same issues and held that class members did not have to satisfy exhaustion requirements to participate in the class.

ASNA's President was aware that "ASNA's claims had already succeeded in *Ramah* without ASNA filing its own claims." J.A. 437. As he explained, "[s]ince the *Zuni* case covered all of ASNA's claims, I concluded that the most efficient course of action was to remain in the *Zuni* case, just as ASNA has remained in the *Ramah* case, because ASNA's claims had already succeeded in *Ramah* without ASNA filing its own claims, and because filing our own claims could apparently remove ASNA from the new *Zuni* class."[5] *Id.* Monitoring and reasonably interpreting applicable legal proceedings, judicial order and opinions, and taking action as necessary does not constitute sleeping on one's rights, particularly in the class action context where parties who believe they are putative class members often remain passive during the early

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[5] ASNA appears to have alleged that the government implied that ASNA's exhaustion of its administrative remedies might have imperiled its chances of being a class member. In any event, ASNA appears to have conceded at oral argument that it did not rely upon this argument on appeal, and we do not rely upon it in reaching our decision. Oral Argument, *available at* http://www.cafc.uscourts.gov/oral-argument-recordings/ 2012-05-07/all.

stages of the litigation allowing the named class representatives to press their claims.

ASNA participated in the *Ramah* and *Zuni* litigations, including taking action to receive its share of settlement proceeds from *Ramah*. Once the *Zuni* stay was lifted in 2005, the government indicated that it would challenge the holding in *Ramah* that presentment was unnecessary to be a class member. In response, ASNA swiftly and diligently presented its claims to the contracting officer in September 2005—without waiting for a court ruling on the presentment issue. ASNA took further precautionary steps when it filed a complaint with the Board in 2006. Only after the case was transferred to a different judge in 2007 did the district court explicitly exclude non-presenters like ASNA from the putative class.

Although the District Court of Oklahoma had denied class certification in *Cherokee* as of February 2001, that decision was not controlling upon the District Court of New Mexico where *Zuni* was pending. The only controlling, on-point authority on that court at that time (2007) was *Ramah*, in which the same judge had explicitly held that a putative class member need not exhaust its administrative remedies to be a member of the class.[6] The facts and circumstances on which Judge Hanson based his order were similar, if not identical to, the operative facts and circumstances on which the *Zuni* complaint was based. We hold that given the existence of the unambiguous court order

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[6] Although not dispositive, we note that some circuits have equitably tolled a statute of limitations when a party detrimentally relied on ambiguity in law or controlling precedent that was later resolved against the party or overturned. *See, e.g.*, *York v. Galetka*, 314 F.3d 522, 525 (10th Cir. 2003); *Harris v. Carter*, 515 F.3d 1051, 1056-57 (9th Cir. 2008).

that specifically addressed the exhaustion of remedies issue and the fact that ASNA diligently pursued its rights by monitoring the relevant legal landscape, ASNA took reasonable, diligent, and appropriate action as the legal landscape evolved.

This result is not fundamentally unfair to the government because filing of the *Zuni* complaint put IHS on notice of the exact nature and scope of ASNA's claims. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983). Having adequate notice, the government was aware of its need to preserve evidence. This is especially true where, as here, the evidence consists of documents in the administrative record, and there are few, if any, concerns about fading witness memory.

The Supreme Court and Congress have repeatedly recognized the special relationship between the government and Indian tribes. *E.g.*, *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); 25 U.S.C. § 450a(b) (reaffirming the federal government's "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole"). Consequently, we must judge the government's conduct with the Indian tribes by "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S. Ct. 1049, 86 L. Ed. 1480, 96 Ct. Cl. 561 (1942). This special relationship is especially crucial under the ISDA, which Congress passed to facilitate and promote economic growth and development amongst the Indian tribes. *See generally* S. Rep. No. 100-274, at 4-7 (1987) (detailing federal

policies encouraging Indian self-determination and tribal economic development). The Select Committee on Indian Affairs recognized that self-determination contracts supporting local government services on Indian lands were "essential to the success of Indian economic development efforts." *Id.* at 7. Although not dispositive, the existence of the special relationship between the government and Indian tribes supports our holding.

In sum, the previous class actions involved similar issues and parties, and put the government on notice of the general nature and legal theory underlying ASNA's claims. ASNA pursued its rights by monitoring the legal landscape and taking action as appropriate. ASNA reasonably relied upon controlling authority, which held that it did not need to exhaust administrative remedies to be a class member. Our conclusion that equitable tolling applies is informed by these unique facts and extraordinary circumstances, taken together with the obligations flowing from the special relationship between the government and Indian tribes. For the foregoing reasons, we reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED

Costs

No costs.

Dissent by: BRYSON

Dissent

Bryson, *Circuit Judge*, dissenting.

The question before us boils down to whether the Arctic Slope Native Association ("ASNA") was diligent in pursuing its breach of contract claim. The majority believes that it was; I believe that it was not.

I

The Supreme Court has held that a litigant seeking equitable tolling "is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010), citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). The Court has allowed equitable tolling "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 & n.3 (1990). Neither of those conditions is present here. ASNA does not suggest that its failure to present its claims on a timely basis was the result of government misconduct, and this case does not involve the filing of a defective pleading, such as a pleading filed in the wrong court. *E.g.*, *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965); *Herb v. Pitcairn*, 325 U.S. 77, 65 S. Ct. 954, 89 L. Ed. 1483 (1945). Moreover, although the Supreme Court in *Irwin* cited *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), as

an example of a case in which the timely filing of a defective class action tolled the limitations period as to individual claims of purported class members, *see* 498 U.S. at 96 n.3, it has already been determined that class action tolling is unavailable to ASNA. In *Arctic Slope Native Ass'n v. Secretary of Health & Human Services*, 583 F.3d 785, 795 (Fed. Cir. 2009) ("*Arctic Slope I*"), we rejected ASNA's claim that it is entitled to class action tolling based on its expectation that it would be a class member in the *Zuni* litigation, so that avenue of relief is closed.

II

In my view, ASNA did not exercise reasonable diligence to protect its rights. ASNA could have, and should have, presented its claims to the contracting officer within six years of their accrual, for two reasons. First, although ASNA claims that it relied on the class certification in the *Ramah* litigation, ASNA had two indications, prior to the expiration of the six-year limitations period, that certification of the class in *Ramah* may have been unusual: (1) the *Ramah* court itself suggested, as the case evolved and certain claims were added (namely, claims alleging that the tribes' full contract support costs should be paid), that the continued appropriateness of a class action was questionable, and (2) the district court in the *Cherokee* case denied class certification on claims essentially identical to those presented in *Zuni*. Second, it would have been very easy for ASNA simply to present its claims to a contracting officer and comply with the statutory presentment requirement.

The indications that the *Ramah* certification may have been questionable would have led a reasonably diligent party to file its claims with the contracting officer before they expired. Approximately a decade

after the *Ramah* complaint was filed, the *Ramah* plaintiffs added new claims similar to those in the *Cherokee* and *Zuni* cases. On December 6, 2002, the *Ramah* court entered an order noting that the government would resist class certification on at least one of the new claims and that "decertification of [both claims] is a possibility." *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1308 (D.N.M. 2002). And in *Cherokee*, which involved claims essentially the same as those presented in *Zuni*, the district court denied class certification in February 2001, prior to the expiration of ASNA's claims. Although the court in that case denied certification because individual questions predominated over class questions, the court noted that the government had argued that certification was inappropriate because the proposed class "fail[ed] to exclude putative class members whose claims in this case are barred by the six-year general statute of limitations." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 362 (E.D. Okla. 2001).

ASNA nevertheless claims that "[t]he undisputed evidence is that ASNA was 'surprised' to learn that the government [in 2005 after the Supreme Court's decision in *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005)] was insisting that every tribal contractor had to have individually presented its own claims." ASNA claims it was surprised "because in *Ramah* [the district judge] had already ruled to the contrary, and because, based on that ruling, over $100 million dollars had already been paid to *Ramah* class members like ASNA who had never presented their claims." Even if ASNA truly was surprised, the surprise can be attributed to—at best—negligence, which is "not a basis for equitable tolling." *See Holland*, 130 S. Ct. at 2573. ASNA was or should have been aware of the statute requiring exhaustion

within six years. ASNA was or should have been aware of the government's position that claimants who had failed to exhaust were not eligible to be members of the classes in *Ramah* and *Cherokee*. Finally, ASNA was or should have been aware of the indications in both *Ramah* and *Cherokee* that the class in *Zuni* might not be certified.

The fact that the district judge in *Ramah* had previously held that presentment was not necessary in that case does not save ASNA here. *Ramah* was a different case and, at the time of the decision on which ASNA relies, that case did not involve claims similar to those presented by the plaintiffs in *Cherokee* and *Zuni*. Additionally, after the judge certified the class in *Ramah*, the six-year limitations period was added to the statutory exhaustion requirement. Thus, in addition to the fact that *Ramah* was a different case with different claims, the judge in *Ramah* was operating under a different statutory framework at the time class certification was granted than was the judge who denied class certification in *Zuni*. Accordingly, a reasonably diligent party would have inferred that *Zuni* was not likely to proceed in the same manner as *Ramah*.

The diligence issue is also influenced by the fact that very little effort would have been required for ASNA to present its claims to the contracting officer. In *Arctic Slope I*, this court noted that the claim letter submissions to the contracting officer "need not be elaborate." 583 F.3d at 797. The letters in the record consist of approximately two typewritten, single-spaced pages for each fiscal year. The letters for each year appear to be identical except for the amount of the claimed damages. It seems reasonable to assume that anyone familiar with the situation could have

prepared the letters with minimal expenditure of time and effort. The damages figure itself appears to be the only element of the letters that required any effort to derive. However, ASNA presumably would have had to present the damages figures to the district court in *Zuni* had its case proceeded there, so there was no added burden on ASNA in having to obtain those figures. Accordingly, a prudent course would have been for ASNA to prepare and submit the letters prior to the expiration of its claims, even if it believed its participation in the *Zuni* class might ultimately make the letters unnecessary. ASNA knew or should have known that the statute required exhaustion, and ASNA knew or should have known that the government was seeking to enforce the statute. With that knowledge, a reasonably diligent party would have prepared and presented the letters prior to the expiration of the six-year period.

Even if ASNA's conduct were regarded as satisfying the diligent pursuit of rights prong of *Holland*, nothing in ASNA's presentation suggests that this case satisfies Holland's second prong, which requires that in addition to demonstrating diligence, the party claiming equitable tolling against the government must show that "some extraordinary circumstance stood in his way and prevented timely filing." Nor has the majority pointed to any facts that would suffice to meet that exacting standard.[1]

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[1] The United States District Court for the District of Columbia has agreed that equitable tolling is unavailable to a party in essentially the same position as ASNA. *Menominee Indian Tribe v. United States*, 841 F. Supp. 2d 99 (D.D.C. 2012). While that decision is, of course, not binding on us, it contains a detailed analysis of the Supreme Court's *Irwin* and *Holland* decisions and,

ASNA's other arguments for applying equitable tolling are not convincing. First, ASNA contends that the government is not likely to be prejudiced by its failure to file its claims on a timely basis, but even assuming that to be the case, the absence of prejudice does not trigger the right to equitable tolling. *See Baldwin Cnty. Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) ("Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."). Second, ASNA argues that equitable tolling is warranted because Indian tribes are disadvantaged and protected plaintiffs. This court, however, has specifically rejected that argument, noting that "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

In sum, I believe that a reasonably diligent party in ASNA's position would have presented its claims to a contracting officer before the six-year limitations period expired. Moreover, in this case there were no "extraordinary circumstances [that] stood in [ASNA's] way and prevented timely filing." *Holland*, 130 S. Ct. at 2562. I would therefore affirm the decision of the Board holding ASNA's claims to be time-barred.

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as the only precedent dealing with the precise issue before us, is entitled to careful consideration.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:07cv00812

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

v.

UNITED STATES OF AMERICA, KATHLEEN SEBELIUS, Secretary of the Department of Health & Human Services, and YVETTE ROUBIDEAUX, Director of the Indian Health Service,

Defendants.

Hon. Rosemary M. Collyer

DECLARATION OF JERRY WAKAU

1. My name is Jerry Wakau, and I am the Administrator of the Health Department of the Menominee Indian Tribe of Wisconsin ("Tribe"). I have been employed with Tribe since 1985. For over 26 years one of my duties has been to participate annually on behalf of Tribe in negotiations with the Indian Health Service ("IHS") over the terms of Contracts and Annual Funding Agreements ("AFAs") under the Indian Self-Determination and Education Assistance Act ("ISDA").

2. I have been asked to describe (1) the Tribe's experiences with the contract support cost class action lawsuits over the years, and (2) how funds are

provided by IHS for contract support costs over each funding year.

The Contract Support Cost Class Actions

3. Since the early 1990s, I have been aware, as have others in the Tribal Government, of the contract support cost class action lawsuit brought by the Ramah Navajo Chapter. We received periodic updates on the case from class counsel and other sources. We understood that, as an ISDA contractor with the Bureau of Indian Affairs ("BIA"), the Tribe was a member of the Ramah class.

4. The Tribe received notice of the New Mexico District Court's ruling in 1993 that the Ramah class was approved and that the case could proceed as a class action. We understood that the court's ruling meant the Tribe did not have to file its own claims to participate in the class. Therefore, the Tribe did not file any contract support cost claims against BIA.

5. The Tribe received notice in 1999 of a partial settlement of the Ramah case for $76 million, and another notice in 2002 of a second partial settlement for $29 million. The Tribe received substantial payments from each of the two partial settlements in the Ramah case.

6. I was also aware, as were others in the Tribe's government, of the parallel contract support cost class action litigation against IHS brought by the Cherokee Nation in 1999. We received notice of the filing of the case in 1999, and periodic updates from class counsel. It was our understanding that the Cherokee class action was nearly identical to the Ramah case except for the agency against which it was brought.

7. Our understanding was that the class included all ISDA contractors with IHS from 1988 to the present, and that as a contractor with IHS during this period, the Tribe was a member of that class. Based on our experience as a member of the Ramah class, the Tribe did not file individual claims against IHS. We assumed that it would work the same way. Our expectation was that the Cherokee class, like the Ramah class, would be approved and the Tribe's claims would be resolved as part of any judgment against or settlement with IHS.

8. In 2001, we learned that the court had denied the Cherokee motion for class certification. Later we learned that the decision was not appealed and that there would be no Cherokee class. At that point, the Tribe considered whether to file individual claims. Our understanding was that the case law was not clear on whether tribal contract support cost claims were valid. There were many meetings concerning contract support and from what we learned, most courts had ruled against such claims. The Tribe has limited resources and it has to very carefully weigh whether it will bring a case against the United States. We also assumed that even if we did file a claim, the contracting officer would deny it since the cases said there was no such claim. Once the Federal Circuit ruled for the Cherokees, we were even more uncertain as to what to do. We knew we had six years to file and with the Cherokee class action we had a little more time. So we waited to see what the Supreme Court would do.

9. In March 2005, after the Supreme Court decided the Cherokee case in favor of tribal contractors, the Tribe had confirmation that its claims

were viable. The Tribe filed its claims as soon as it could on September 7, 2005.

Contract Support Cost Payment Process

10. I have also been asked to describe how funds are provided by IHS for contract support costs over the AFA funding year. Specifically, I have been asked if the Tribe engages in separate negotiations with IHS to add contract support costs funds to the AFA after the parties negotiate the initial amount that is identified in the AFA.

11. Generally, when we sit down to negotiate with IHS, the 1HS tells us that we can only identify in the AFA an amount for contract support costs that is consistent with what the IHS paid the previous year and that is consistent with the amount of funds the IHS believes it will have available to pay. This amount is always less than the amount that is calculated by application of the indirect cost rate to the base, the methodology the IHS's policy uses to calculate the total amount of contract support costs that Tribe is entitled to be paid under the ISDA in a given year.

12. Each year it is understood by both parties that if more funds become available, IHS will pay those additional funds to the Tribe through the AFA without the parties needing to negotiate an amendment that reflects the increased amount. The fact is that the IHS has never paid us the entire amount calculated by application of the indirect cost rate to the base because they have told us that they are chronically short of funds and that Congress has not appropriated sufficient funds for them to pay us with. So far as I am aware, the Tribe has never engaged in separate negotiations for additional contract support cost funds to be added to the AFAs.

13. In every year from 1995 through 2000, I believe that the Tribe had in place indirect cost rate agreements with the Federal Government that were used to calculate and identify the full amount of contract support costs that the Tribe was entitled to be paid under the ISDA and our AFAs with the IHS. in each of those years, the Tribe suffered indirect cost shortfalls that had to be made up by using program funds or tribal funds, resulting in either a reduction in health care service or a tribal subsidy of federal health programs. Based on the Tribe's records and calculations, the shortfalls are as set forth in paragraph 25 of the Complaint.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 31 day of May, 2011.

By Jerry Wakau
Jerry Wakau
Health Administrator
Menominee Indian Tribe of
Wisconsin

JOINT APPENDIX

No. 14-510

IN THE

Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 3, 2014
CERTIORARI GRANTED JUNE 30, 2015

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United States District Court of the District of Columbia, No. 1:07-cv-00812-RMC, Relevant Docket Entries 1

United States Court of Appeals for the District of Columbia Circuit, No. 09-5005, Relevant Docket Entries 14

United States Court of Appeals for the District of Columbia Circuit, No. 12-5217, Relevant Docket Entries 20

Exhibit M, Plaintiff's Motion for Summary Judgment, Memorandum No. 46A-2005, RE: Action Needed to Protect Claims Over the Indian Health Services' Underpayment of Contract Support Costs (June 24, 2005), *Menominee Indian Tribe of Wisconsin v. U.S.*, 841 F. Supp. 2d 99 (D.D.C. 2012) 24

Exhibit N, Plaintiff's Motion for Summary Judgment, Dear Tribal Leader Letter (March 5, 1999) and General Bulletin No. 2A-99, RE: The Cherokee Nation and the Shoshone-Paiute Tribes file a nationwide class action lawsuit against the Indian Health Service for back due contact support costs (March 5, 1999), *Menominee Indian Tribe of Wisconsin v. U.S.*, 841 F. Supp. 2d 99 (D.D.C. 2012) 28

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Exhibit I, Plaintiff's Motion for Summary Judgment, United States District Court for the District of New Mexico Order and Memorandum Order Certifying Class, *Ramah Navajo Chapter v. Lujan, et al.* (October 1, 1993), *Menominee Indian Tribe of Wisconsin v. U.S.*, 841 F. Supp. 2d 99 (D.D.C. 2012) 35

Exhibit B, Defendants' Motion to Dismiss, Menominee Tribe's 1996 Self-Determination Agreement with IHS Contract # 239-96-0030, Effective Date: January 1, 1996 (December 21, 1995), Menominee Indian Tribe of Wisconsin v. U.S., 841 F. Supp. 2d 99 (D.D.C. 2012) 41

Exhibit C, Defendants' Motion to Dismiss, Menominee Tribe's Attachment 2-97 to IHS Contract No. 239-96-0030 Annual Funding Agreement Effective: 1/1/97-12/31/97 (January 17, 1997), *Menominee Indian Tribe of Wisconsin v. U.S.*, 841 F. Supp. 2d 99 (D.D.C. 2012) 77

Exhibit D, Defendants' Motion to Dismiss, Menominee Tribe's 1998 Annual Funding Agreement 1/1/98-12/31/98 Attachment 2-98 to IHS Contract No. 239-96-0030 (January 1, 1998), *Menominee Indian Tribe of Wisconsin v. U.S.*, 841 F. Supp. 2d 99 (D.D.C. 2012) 96

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Exhibit G, Defendants' Motion to Dismiss, Declaration of William F. Fisher (April 29, 2011), *Menominee Indian Tribe of Wisconsin v. U.S.*, 841 F. Supp. 2d 99 (D.D.C. 2012) 117

NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 14-510 Petition For A Writ Of Certiorari at the following pages:

APPENDIX A: *Menominee Indian Tribe of Wis. v. United States*, 764 F.3d 51 (D.C. Cir. 2014) ("Menominee IV") (Pet. App 1a-19a) 1a

APPENDIX B: *Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99 (D.D.C. 2012) ("Menominee III") (Pet. App. 20a-43a) 20a

APPENDIX C: *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519 (D.C. Cir. 2010) ("Menominee II") (Pet. App. 44a-68a) ... 44a

APPENDIX D: *Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) ("Menominee I") (Pet. App. 69a-74a) 69a

APPENDIX E: *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) ("ASNA II") (Pet. App. 75a-97a) 75a

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APPENDIX F: *Decl. of Jerry Wakau, Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99 (D.D.C. 2012) (No. 07-cv-00812) (Pet. App. 98a-102a)..... 98a

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA (WASHINGTON, D.C.)

Civil Docket For Case # 1:07-cv-00812-RMC

MENOMINEE INDIAN TRIBE OF WISCONSIN,

v.

UNITED STATES OF AMERICA, ET AL.,

RELEVANT DOCKET ENTRIES

DATE FILED	#	DOCKET TEXT
05/03/2007	1	COMPLAINT against UNITED STATES OF AMERICA, MICHAEL O. LEAVITT, CHARLES W. GRIM (Filing fee $ 350, receipt number 4616004002) filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Attachments: # 1 certificate of service # 2 Civil Cover Sheet)(tg,) (Entered: 05/04/2007)
		* * * *
08/15/2007	6	MOTION to Dismiss by UNITED STATES OF AMERICA, MICHAEL O. LEAVITT, CHARLES W. GRIM (Attachments: # 1 Exhibit Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit F # 7 Exhibit G # 8 Exhibit H # 9 Exhibit I # 10 Exhibit J # 11 Text

DATE FILED	#	DOCKET TEXT
		of Proposed Order) (Ulrich, Tamara) (Entered: 08/15/2007)
		* * * *
09/10/2007	9	Memorandum in opposition to re 6 MOTION to Dismiss filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Attachments: # 1 Exhibit Ex A – ISDM 92-2 # 2 Exhibit Ex. B – IHS Circular 96-04 # 3 Exhibit Ex. C – IDC Rate Agreements # 4 Exhibit Ex. D – Shortfall Reports # 5 Exhibit Ex. E – Seldovia # 6 Exhibit Ex. F – Zuni # 7 Text of Proposed Order Proposed Order Denying Motion to Dismiss) (Willis, F.) (Entered: 09/10/2007)
		* * * *
09/25/2007	11	REPLY to opposition to motion re 6 MOTION to Dismiss filed by UNITED STATES OF AMERICA, MICHAEL O. LEAVITT, CHARLES W. GRIM. (Attachments: # 1 Exhibit K # 2 Exhibit L) (Ulrich, Tamara) (Entered: 09/25/2007)
01/22/2008	12	NOTICE OF SUPPLEMENTAL AUTHORITY by MENOMINEE INDIAN TRIBE OF WISCONSIN (Attachments: # 1 Athey v United States, # 2 Solow v United States, # 3 GHS HMO v United States) (Willis, F.) (Entered: 01/22/2008)

DATE FILED	#	DOCKET TEXT
02/29/2008		NOTICE of Hearing: A Motion Hearing is set for 3/11/2008 at 2:00PM in Courtroom 2, main building, 2nd floor, before Judge Rosemary M. Collyer. (cdw) Modified on 3/11/2008 (cdw,). (Entered: 02/29/2008)
		* * * *
03/11/2008		Minute Entry for proceedings held before Judge Rosemary M. Collyer: Motion Hearing held on 3/11/2008 re 6 Motion to Dismiss. Motion heard and taken under advisement. (Court Reporter: Crystal Pilgrim) (cdw) (Entered: 03/12/2008)
03/14/2008	14	MEMORANDUM OPINION. Signed by Judge Rosemary M. Collyer on 3/14/08. (lcrmc2) (Entered: 03/14/2008)
03/14/2008	15	ORDER granting in part and denying in part 6 Defendants' Motion to Dismiss. See attached Order for further details. Signed by Judge Rosemary M. Collyer on 3/14/08. (lcrmc2) (Entered: 03/14/2008)
03/24/2008	16	MOTION for Reconsideration re 15 Order on Motion to Dismiss by MENOMINEE INDIAN TRIBE OF WISCONSIN (Attachments: #1 Exhibit A – Ramah 1993 Order, # 2 Exhibit B – Susanville 2-6-02,

DATE FILED	#	DOCKET TEXT
		# 3 Text of Proposed Order Granting Motion for Partial Reconsideration)(Willis, F.) (Entered: 03/24/2008)
04/07/2008	17	Memorandum in opposition to re 16 MOTION for Reconsideration re 15 Order on Motion to Dismiss MOTION for Reconsideration re 15 Order on Motion to Dismiss filed by UNITED STATES OF AMERICA, MICHAEL O. LEAVITT, CHARLES W. GRIM. (Ulrich, Tamara) (Entered: 04/07/2008)
04/11/2008	18	REPLY to opposition to motion re 16 MOTION for Reconsideration re 15 Order on Motion to Dismiss MOTION for Reconsideration re 15 Order on Motion to Dismiss filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Willis, F.) (Entered: 04/11/2008)
04/30/2008	19	ORDER denying 16 Plaintiff's Motion for Partial Reconsideration of the Court's March 14, 2008 Memorandum Opinion and Order. See attached Order for further details. Signed by Judge Rosemary M. Collyer on 4/30/08. (lcrmc2) (Entered: 04/30/2008)

DATE FILED	#	DOCKET TEXT
05/15/2008	20	ANSWER to 1 Complaint by UNITED STATES OF AMERICA, MICHAEL O. LEAVITT, CHARLES W. GRIM. Related document: 1 Complaint filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Ulrich, Tamara) (Entered: 05/15/2008)
		* * * *
11/21/2008	26	STIPULATION of Dismissal *and Proposed Order* by MENOMINEE INDIAN TRIBE OF WISCONSIN, UNITED STATES OF AMERICA, MICHAEL O. LEAVITT, CHARLES W. GRIM. (Ulrich, Tamara) (Entered: 11/21/2008)
11/24/2008	27	ORDER approving 26 Joint Stipulation of Dismissal. See attached Order for further details. This case is closed. Signed by Judge Rosemary M. Collyer on 11/24/08. (lcrmc2) (Entered: 11/24/2008)
12/31/2008	28	NOTICE OF APPEAL as to 27 Order by MENOMINEE INDIAN TRIBE OF WISCONSIN. Filing fee $ 455, receipt number 4616017343. Fee Status: Fee Paid. Parties have been notified. (tg,) (Entered: 01/05/2009)
		* * * *

DATE FILED	#	DOCKET TEXT
01/09/2009		USCA Case Number 09-5005 for 28 Notice of Appeal filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (tg,) (Entered: 01/09/2009)
07/30/2010	29	USCA JUDGMENT as to 28 Notice of Appeal filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date. (kb,) (Entered: 08/02/2010)
		* * * *
10/22/2010	32	MANDATE of USCA (certified copy) as to 28 Notice of Appeal filed by MENOMINEE INDIAN TRIBE OF WISCONSIN; USCA Case Number 09-5005. ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded for further proceedings, in accordance with the opinion of the court filed herein this date. (kb,) (Entered: 10/22/2010)
		* * * *

DATE FILED	#	DOCKET TEXT
04/29/2011	35	MOTION to Dismiss *or, in the Alternative,* MOTION for Summary Judgment by CHARLES W. GRIM, MICHAEL O. LEAVITT, UNITED STATES OF AMERICA (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Statement of Facts, # 12 Text of Proposed Order) (Ulrich, Tamara) (Entered: 04/29/2011)
06/03/2011	36	Memorandum in opposition to re 35 MOTION to Dismiss *or, in the Alternative*, MOTION for Summary Judgment filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Attachments: # 1 Exhibit G, # 2 Exhibit H, # 3 Exhibit I, # 4 Exhibit J, # 5 Exhibit K, # 6 Exhibit L, # 7 Exhibit M, # 8 Exhibit N, # 9 Statement of Facts Response to, # 10 Text of Proposed Order) (Ryan, Lisa) (Entered: 06/03/2011)
06/03/2011	37	MOTION for Summary Judgment *and Memorandum of Law in Support thereof* by MENOMINEE INDIAN TRIBE OF WISCONSIN (Attachments: # 1 Statement of

DATE FILED	#	DOCKET TEXT
		Facts, # 2 Text of Proposed Order) (Ryan, Lisa) (Entered: 06/03/2011)
06/24/2011	38	REPLY to opposition to motion re 35 MOTION to Dismiss *or, in the Alternative*, MOTION for Summary Judgment filed by CHARLES W. GRIM, MICHAEL O. LEAVITT, UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit K, # 2 Exhibit L) (Ulrich, Tamara) (Entered: 06/24/2011)
06/24/2011	39	Memorandum in opposition to re 37 MOTION for Summary Judgment *and Memorandum of Law in Support thereof* filed by CHARLES W. GRIM, MICHAEL O. LEAVITT, UNITED STATES OF AMERICA. (Attachments: # 1 Exhibit K, # 2 Exhibit L) (Ulrich, Tamara) (Entered: 06/24/2011)
		* * * *
07/20/2011	41	REPLY to opposition to motion re 37 MOTION for Summary Judgment *and Memorandum of Law in Support thereof and Supplemental Brief in Opposition to Motion to Dismiss, etc.* filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Attachments: # 1 Affidavit)(Ryan, Lisa) (Entered: 07/20/2011)

DATE FILED	#	DOCKET TEXT
07/20/2011	42	Memorandum in opposition to re 35 MOTION to Dismiss *or, in the Alternative*, MOTION for Summary Judgment *Reply on Plaintiff's MSJ and Supp. Response in Opposition to Motion to Dismiss* filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Attachments: # 1 Affidavit)(Ryan, Lisa) (Entered: 07/20/2011)
07/28/2011	43	MOTION for Discovery *pursuant to Rule 56(d)*, MOTION for Leave to File a *sur-reply* by CHARLES W. GRIM, MICHAEL O. LEAVITT, UNITED STATES OF AMERICA (Attachments: # 1 Affidavit, # 2 Text of Proposed Order) (Ulrich, Tamara) (Entered: 07/28/2011)
08/03/2011	44	Memorandum in opposition to re 43 MOTION for Discovery *pursuant to Rule 56(d)* MOTION for Leave to File a *sur-reply* filed by MENOMINEE INDIAN TRIBE OF WISCONSIN. (Attachments: # 1 Text of Proposed Order) (Ryan, Lisa) (Entered: 08/03/2011)
08/10/2011	45	REPLY to opposition to motion re 43 MOTION for Discovery *pursuant to Rule 56(d)* MOTION for Leave to File a *sur-reply* filed by CHARLES W. GRIM, MICHAEL O. LEAVITT, UNITED STATES

DATE FILED	#	DOCKET TEXT
		OF AMERICA. (Ulrich, Tamara) (Entered: 08/10/2011)
		* * * *
09/23/2011	46	NOTICE OF SUPPLEMENTAL AUTHORITY by MENOMINEE INDIAN TRIBE OF WISCONSIN (Attachments: # 1 Exhibit Federal Circuit Decision) (Ryan, Lisa) (Entered: 09/23/2011)
10/11/2011		MINUTE ORDER: On appeal, the D.C. Circuit declined to rule on the application of the equitable tolling doctrine because the parties disputed relevant facts. Menominee Indian Tribe of Wisonsin v. U.S., 614 F.3d 519, 531 (D.C. Cir. 2010). Before the Court are cross motions for summary judgment. The parties shall file separate supplements to their briefs no later than October 25, 2011 identifying those facts that were disputed and no longer are disputed. Signed by Judge Rosemary M. Collyer on 10/11/2011. (lcrmc2) (Entered: 10/11/2011)
		* * * *
10/25/2011	47	SUPPLEMENTAL MEMORANDUM to re Order„ *on Facts Relevant to Equitable Tolling* filed by MENOMINEE INDIAN TRIBE

DATE FILED	#	DOCKET TEXT
		OF WISCONSIN. (Ryan, Lisa) (Entered: 10/25/2011)
10/25/2011	48	SUPPLEMENTAL MEMORANDUM to filed by CHARLES W. GRIM, MICHAEL O. LEAVITT, UNITED STATES OF AMERICA. (Ulrich, Tamara) (Entered: 10/25/2011)
10/31/2011	49	RESPONSE re 47 Supplemental Memorandum filed by CHARLES W. GRIM, MICHAEL O. LEAVITT, UNITED STATES OF AMERICA. (Ulrich, Tamara) (Entered: 10/31/2011)
		* * * *
01/24/2012	52	MEMORANDUM AND OPINION. Signed by Judge Rosemary M. Collyer on 1/24/2012. (lcrmc2) (Entered: 01/24/2012)
01/24/2012	53	ORDER granting in part and denying in part 35 Defendant's Motion for Summary Judgment, and denying 37 Plaintiff's Motion for Summary Judgment. See order for further details. The courtroom deputy shall schedule a status conference for this case. Signed by Judge Rosemary M. Collyer on 1/24/2012. (lcrmc2) (Entered: 01/24/2012)
		* * * *

DATE FILED	#	DOCKET TEXT
05/01/2012	55	ORDER dismissing case. This case is dismissed without prejudice and, without further action by the parties or the Court, will be dismissed with prejudice 45 days from the date of this Order. Signed by Judge Rosemary M. Collyer on 5/1/2012. (lcrmc2) (Entered: 05/01/2012)
05/11/2012	56	STIPULATION of Dismissal by CHARLES W. GRIM, MICHAEL O. LEAVITT, MENOMINEE INDIAN TRIBE OF WISCONSIN, UNITED STATES OF AMERICA. (Ulrich, Tamara) (Entered: 05/11/2012)
07/11/2012	57	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 53 Order on Motion for Summary Judgment,,, 55 Order by MENOMINEE INDIAN TRIBE OF WISCONSIN. Filing fee $ 455, receipt number 0090-2998753. Fee Status: Fee Paid. Parties have been notified. (Willis, F.) (Entered: 07/11/2012)
		* * * *
10/30/2014	61	MANDATE of USCA (certified copy) as to 57 Notice of Appeal to DC Circuit Court, filed by MENOMINEE INDIAN TRIBE OF WISCONSIN; USCA Case Number 12-5217. ORDERED and

DATE FILED	#	DOCKET TEXT
		ADJUDGED that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date. (Attachments: # 1 USCA Opinion) (kb) (Entered: 10/31/2014)

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

Court of Appeals Docket # 09-5005

MENOMINEE INDIAN TRIBE OF WI

v.

USA

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
	* * * *
01/08/2009	NOTICE OF APPEAL filed [1158021] by Menominee Indian Tribe of Wisconsin of decision of U.S. District Court. [09-5005](Lister, Mary)
	* * * *
02/19/2009	DOCKETING STATEMENT FILED [1166528] by Menominee Indian Tribe of Wisconsin [Service Date: 02/18/2009] [09-5005]
	* * * *
02/19/2009	STATEMENT of Issues FILED [1166534] by Menominee Indian Tribe of Wisconsin [Service Date: 02/18/2009] [09-5005]

DATE	DOCKET TEXT
	* * * *
04/23/2009	MOTION LODGED [1177732] by Tanana Chiefs Conference, St. Croix Chippewa Indians of Wisconsin, Southeast Alaska Regional Health Consortium, Southcentral Foundation, Port Gamble S'Klallam Tribe, Kodiak Area Native Association, Forest County Potawatomi, Fond du Lac Band of Lake Superior Chippewa, Citizen Potawatomi Nation, Chugachmiut, Choctaw Nation of Oklahoma, Chickasaw Nation, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Arctic Slope Native Association and Alaska Native Tribal Health Consortium to participate as amicus curiae. [Disclosure Listing: Attached] [Service Date: 04/23/2009] [09-5005]
04/23/2009	STATEMENT FILED [1177734] by Alaska Native Tribal Health Consortium, Arctic Slope Native Association, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Chickasaw Nation, Choctaw Nation of Oklahoma, Chugachmiut, Citizen Potawatomi Nation, Fond du Lac Band of Lake Superior Chippewa, Forest County Potawatomi, Kodiak Area Native Association, Port Gamble S'Klallam

DATE	DOCKET TEXT
	Tribe, Southcentral Foundation, Southeast Alaska Regional Health Consortium, St. Croix Chippewa Indians of Wisconsin and Tanana Chiefs Conference with Disclosure Listing [Service Date: 04/23/2009] [09-5005]
04/23/2009	ENTRY OF APPEARANCE filed [1177763] by Mr. Donald Jay Simon and Mr. Lloyd Benton Miller for Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Fond du Lac Band of Lake Superior Chippewa, Alaska Native Tribal Health Consortium, Arctic Slope Native Association, Chickasaw Nation, Choctaw Nation of Oklahoma, Chugachmiut, Citizen Potawatomi Nation, Forest County Potawatomi, Kodiak Area Native Association, Port Gamble S'Klallam Tribe, Southcentral Foundation, Southeast Alaska Regional Health Consortium, St. Croix Chippewa Indians of Wisconsin and Tanana Chiefs Conference [09-5005]
	* * * *
05/13/2009	APPELLANT BRIEF [1180708] filed by Menominee Indian Tribe of Wisconsin [Mail Service Date: 05/13/2009] Copies: 7 (Initial Brief); Pages: 54; Word Count for Brief: 13,585; Disclosure Statement: Not

DATE	DOCKET TEXT
	Applicable to this Party; Certificate of Parties: Attached [09-5005]
	* * * *
05/20/2009	AMICUS FOR APPELLANT BRIEF [1181597] filed by Alaska Native Tribal Health Consortium, Arctic Slope Native Association, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Chickasaw Nation, Choctaw Nation of Oklahoma, Chugachmiut, Citizen Potawatomi Nation, Fond du Lac Band of Lake Superior Chippewa, Forest County Potawatomi, Kodiak Area Native Association, Port Gamble S'Klallam Tribe, Southcentral Foundation, Southeast Alaska Regional Health Consortium, St. Croix Chippewa Indians of Wisconsin and Tanana Chiefs Conference [Service Date: 05/19/2009] Copies: 15 (Final Brief); Pages: 21-30; Disclosure Statement: Attached; Certificate of Parties: Attached [09-5005]
	* * * *
07/15/2009	APPELLEE BRIEF [1196545] filed by USA [Service Date: 07/15/2009] Length of Brief: 12004 words Wordperfect 14pt font. [09-5005] (Kinner, Donald)
07/29/2009	APPELLANT REPLY BRIEF [1199047] filed by Menominee

DATE	DOCKET TEXT
	Indian Tribe of Wisconsin [Service Date: 07/29/2009] Length of Brief: 6,991. [09-5005]
08/04/2009	APPENDIX [1199855] filed [Volumes:1] [Service Date: 08/04/2009] [09-5005] (Schmidt, Marsha)
	* * * *
08/14/2009	APPELLEE FINAL BRIEF [1201484] filed by USA [Mail Service Date: 08/14/2009]. Length of Brief: Pages: 52; Word Count: 12,004. [09-5005]
08/18/2009	APPELLANT FINAL BRIEF [1201778] filed by Menominee Indian Tribe of Wisconsin [Service Date: 08/18/2009] Length of Brief: 13,585 words. [09-5005] (Strommer, Geoffrey)
08/18/2009	APPELLANT FINAL REPLY BRIEF [1201779] filed by Menominee Indian Tribe of Wisconsin [Service Date: 08/18/2009] Length of Brief: 6,996 words. [09-5005] (Strommer, Geoffrey)
	* * * *
10/02/2009	LETTER FILED [1209441] by Menominee Indian Tribe of Wisconsin pursuant to FRAP 28j advising of additional authorities [Service Date: 10/02/2009] [09-5005] (Strommer, Geoffrey)

DATE	DOCKET TEXT
	* * * *
11/17/2009	ORAL ARGUMENT HELD before Judge Ginsburg, Tatel and Griffith [09-5005]
	* * * *
07/30/2010	PER CURIAM JUDGMENT filed [1258181] reversing the judgment of the district court and remanding case for further proceedings for the reasons in the accompanying opinion . Before Judges: Ginsburg, Tatel and Griffith. [09-5005] (Lister, Mary)
07/30/2010	OPINION filed [1258183] (Pages: 24) for the Court by Judge Griffith [09-5005] (Lister, Mary)
	* * * *
09/24/2010	MANDATE ISSUED to Clerk, District Court [09-5005]

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA COURT

Court of Appeals Docket # 12-5217

MENOMINEE INDIAN TRIBE

v.

USA, et al.

RELEVANT DOCKET ENTRIES

DATE	DOCKET TEXT
	* * * *
07/12/2012	NOTICE OF APPEAL filed [1383307] by Menominee Indian Tribe of Wisconsin seeking review of a decision by the U.S. District Court in 1:07-cv-00812-RMC. Assigned USCA Case Number [12-5217]
	* * * *
08/13/2012	DOCKETING STATEMENT FILED [1388924] by Menominee Indian Tribe of Wisconsin [Service Date: 08/13/2012] [12-5217] (Strommer, Geoffrey)
	* * * *

DATE	DOCKET TEXT
08/13/2012	STATEMENT OF ISSUES FILED [1388929] by Menominee Indian Tribe of Wisconsin [Service Date: 08/13/2012] [12-5217] (Strommer, Geoffrey)
	* * * *
08/13/2012	UNDERLYING DECISION IN CASE submitted [1388933] by Menominee Indian Tribe of Wisconsin [Service Date: 08/13/2012] [12-5217] (Strommer, Geoffrey)
	* * * *
07/30/2013	APPELLANT BRIEF [1449162] filed by Menominee Indian Tribe of Wisconsin [Service Date: 07/30/2013] Length of Brief: 12,209. [12-5217] (Strommer, Geoffrey)
08/30/2013	APPELLEE BRIEF [1454395] filed by Yvette Roubideaux, Kathleen Sebelius and USA [Service Date: 08/30/2013] Length of Brief: 11,253 words. [12-5217] (Kinner, Donald)
09/19/2013	MODIFIED EVENT–APPELLANT REPLY BRIEF [1457413] filed by Menominee Indian Tribe of Wisconsin [Service Date: 09/19/2013] Length of Brief: 6,932 words [12-5217]–[Edited 09/20/2013 by JMC] (Strommer, Geoffrey)
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DATE	DOCKET TEXT
10/02/2013	APPENDIX [1459257] filed [Volumes: 1] [Service Date: 10/02/2013] [12-5217] (Strommer, Geoffrey)
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10/10/2013	APPELLANT FINAL BRIEF [1460640] filed by Menominee Indian Tribe of Wisconsin [Service Date: 10/10/2013] Length of Brief: 12,246. [12-5217] (Strommer, Geoffrey)
10/10/2013	APPELLANT FINAL REPLY BRIEF [1460641] filed by Menominee Indian Tribe of Wisconsin [Service Date: 10/10/2013] Length of Brief: 6,940. [12-5217] (Strommer, Geoffrey)
10/11/2013	APPELLEE FINAL BRIEF [1460823] filed by Yvette Roubideaux, Kathleen Sebelius and USA [Service Date: 10/11/2013] Length of Brief: 11,246. [12-5217] (Kinner, Donald)
	* * * *
09/02/2014	PER CURIAM JUDGEMENT filed [1510139] that the judgement of the District Court appealed from in this cause is hereby affirmed, for the reasons in the accompanying opinion. Before Judges: Garland, Tatel and Pillard. [12-5217]
09/02/2014	OPINION filed [1510140] (Pages: 19) for the Court by Judge Pillard [12-5217]
	* * * *

DATE	DOCKET TEXT
10/29/2014	MANDATE ISSUED to Clerk, District Court [12-5217]

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URGENT
ACTION ALERT

MEMORANDUM NO. 46A-2005

June 24, 2005

TO: Tribal Attorneys Representing Tribes and Tribal Organizations Contracting with the Indian Health Service and Interested in the *Zuni v. United States* class action lawsuit

FROM: Sonosky, Chambers, Sachse, Endreson & Perry, LLP

RE: Action needed to Protect Claims Over the Indian Health Services' Underpayment of Contract Support Costs

As attorneys for the Zuni Tribe in a putative class action involving IHS contract support costs, we write to attorneys for other tribes and tribal organizations contracting with the Indian Health Service.

Based on recent events in the Zuni litigation, we recommend that you consider whether to file administrative claims with IHS in order to preserve your tribal client's rights in the event the IHS failed to pay your full contract support costs in the mid-1990s. We are recommending such a course for our firm's tribal clients.

As you know, on March 1, 2005, the United States Supreme Court unanimously held the Federal Government liable in money damages for failing to pay in full the "contract support costs" that were owed Tribes in the mid-1990s under their self-determination contracts with IHS.[1]

Although the Supreme Court's ruling only involved the Cherokee Nation and the Shoshone-Paiute Tribes, in 2001 the Pueblo of Zuni filed a putative class action lawsuit against IHS to protect other Tribes, and that lawsuit has now been reactivated. *Zuni v. United States*, No. 01-1046 (D. NM). The Zuni lawsuit has the potential to extend the benefit of the Supreme Court's ruling to other Indian Tribes.

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[1] *See Cherokee Nation and Shoshone-Paiute Tribes v. Leavitt, et al.*, 125 S.Ct. 1172 (2005). A copy of the decision is available on our website at www.cscclass.net, and is discussed in our Memorandum No. 23A-2005 (March 4, 2005). Our firm handled the Supreme Court case for the Tribes.

This Memorandum concerns an important new development in that lawsuit. (Our firm represents the Zuni Tribe in that case.) In very recent court filings the Government is defending the *Zuni* lawsuit by arguing that, in order for a Tribe to be eligible to be paid any damages over its contract underpayments, the Tribe must have filed an administrative claim with IHS under the Contract Disputes Act. We do not agree with this position. In fact, in 1993 the federal court in Albuquerque rejected this very same position in a class action lawsuit involving BIA contracts. However, no one can guarantee that the Government's argument might not be accepted by a judge in the *Zuni* case or in some other case in the future.

Given the risk that the Government's argument *might* be accepted, and given the relative ease of filing an administrative claim with IHS, in our opinion, and as an added protection, we are recommending to our tribal clients who have been underpaid that they file administrative claims with IHS as soon as possible.

For any Tribe that decides to file, separate administrative claims should be filed for each year under each IHS contract (or compact). Claims involving Title I contracts under the Indian Self-Determination Act should be filed with the Tribe's IHS "contracting officer," one for each contract year. Claims involving Self-Governance compacts should be filed with IHS Director Grim in Rockville.

"Filing" is done by mailing a properly certified claim, by return receipt U.S. mail. A sample form for such claims accompanies this Memorandum. Claims should be filed going back to at least federal fiscal year 1995, and should be filed for each year through at least 1999. (You may also wish to consider additional claims for

years 2000 through 2005 which may also be filed at this time.)

We recognize, of course, that the judge in the *Zuni* case may well reject the Government's defense tactic. But even if that occurs, claims prepared now may still be important. This is so because, in the event of a victory in the case, all Tribes will at that time need to document their claims in order to be paid. In short, the work done now to prepare these claims will be valuable later if the case is successfully concluded, and filing now helps protect against a Tribe potentially being disqualified from recovering at all.[2]

For further information, please feel free to email Lloyd Miller (lloyd@sonosky.net) or Melanie Osborne (melanie@sonosky.net), or to call them at 907-258-6377.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP

By: Lloyd B. Miller
Melanie B. Osborne

Enclosure

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[2] The Government, of course, has raised many other defenses, including the defense that the time is too late to file claims. Here, again, we do not agree, and we believe other Supreme Court cases support our position. Still, **by filing your claims now you will be taking every step possible at this time to protect your Tribe's position.**

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OF COUNSEL
ARTHUR LAZARUS, JR.
ROGER W. DUBROCK*

March 5, 1999

Dear Tribal Leader:

I write to inform you of a class action lawsuit filed today in Oklahoma against the Indian Health Service to recover damages caused by IHS's failure to pay contract support costs due under the Indian Self-Determination Act.

The Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of Nevada filed the case on their own behalf and on behalf of all other tribal contractors in the United States that have similar claims. As you may know, earlier this year the federal court in Oregon ruled against IHS on a similar lawsuit brought in 1995 by the Shoshone-Bannock Tribes of Idaho. We represent the Shoshone-Bannock Tribes in that case, and the Cherokee and Shoshone-Paiute Tribes have retained us to handle this case as well.

The case seeks damages to the extent IHS failed to pay tribal contractors their full contract support cost entitlements (including indirect costs) as a result of IHS's decisions in various years that appropriations were not available to meet the agency's statutory and contractual obligations to fully pay such costs. If your Tribe had a self-determination contract or self-governance compact with the Indian Health Service from 1988 to the present, you may have a claim that would be covered by the new class action lawsuit. If you like, we would be happy to talk with you or your attorneys to determine whether your Tribe's claims may be covered by this new case.

Over the next few weeks we will be assessing the early procedural aspects of the case. We expect that early on IHS will try to have the case dismissed by arguing that a rider in last year's appropriations act extinguished some or all of the claims. IHS has raised this same defense in other cases, and to our knowledge no judge has yet ruled on the defense. We will, of course, vigorously oppose any IHS efforts to dismiss the case for this or any other reason.

There is every indication IHS will vigorously defend this case, and that the case could very possibly take years to resolve. During this time, we believe it is

critical that interested Tribes and tribal health care providers be kept informed of key developments in the case. Toward that end, we plan to set up a web page where information, new developments and key documents can be posted. We plan to discuss with IHS and the court whether key pleadings and court orders might be posted as well. All this will take some time.

In the meantime, we will use the mail for this purpose. If this letter has been misaddressed, please let us know. If there is someone else in your tribal organization who should receive it, please let us know. Finally, if you have an e-mail address please send us that information too, together with your telephone and telefax information. For now, you can write us at SONOSKYANC@AOL.COM or by mail at the address shown on our letterhead for additional information.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

Lloyd Benton Miller
Attorneys for the Cherokee Nation
and Shoshone-Paiute Tribes

LBM/ct
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OF COUNSEL
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ROGER W. DUBROCK*

March 5, 1999

GENERAL BULLETIN NO. 2A-99

To: All Interested Tribes

From: Sonosky, Chambers, Sachse, Miller & Munson

Subject: The Cherokee Nation and the Shoshone-Paiute Tribes file a nationwide class action lawsuit against the Indian Health Service for back due contact support costs.

This week the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of Nevada filed a nation-wide class action lawsuit against the Indian Health Service for unpaid contract support costs. The lawsuit was filed in federal district court in Oklahoma, and a copy of the Complaint is enclosed for your information, together with a "Dear Tribal Leader" letter sent to all tribes explaining the case. As you will see, our firm represents the Cherokee and Shoshone-Paiute Tribes in this matter.

The lawsuit arises out of the IHS practice over many years of limiting the amount of contract support costs (CSC) IHS would pay tribes in connection with self-determination contracts and self-governance compacts. Under IHS policy carried out over the course of many years, each year IHS would limit the amount of contract support costs to be paid out of its appropriation. IHS would then require tribes to live within that limit.

For programs recently taken over by tribes, IHS applied this policy by placing tribes on a first-come first-served list (or "queue"), ranked by the date on which a tribe first took over the operation of an IHS program; if the funds IHS set aside for this purpose were insufficient to pay all the listed tribal CSC requirements, some tribes would receive nothing. Depending on how far down such tribes appeared on the list, tribes might wait two, three or many more years before ever receiving any contract support costs associated with particular programs.

As a result of this policy, the Complaint alleges that for two years the Shoshone-Paiute were denied any contract support at all to operate the Owyhee Hospital. Similarly, the Complaint alleges that the Cherokee Nation received no contract support costs at

all for seven years in connection with two of the Nation's clinics and the Nation's contract health care program.

Under the same IHS policy, IHS also limited the amount of contract support costs that would be made available for older IHS programs already under tribal operation for many years. Tribes such as the Cherokee Nation thus received less than their full statutory entitlement on older programs in years when either their indirect rates went up, or the size of their programs increased (such as by the addition of mandatory increases).

The new lawsuit alleges that IHS's policy was unlawful because the payment of contract support costs under the Indian Self-Determination Act is only subject to the availability of appropriations from Congress, and that in each year Congress made available sufficient appropriations to pay 100% of all tribal contract support costs requirements.

Although not mentioned in the suit, you should know that some of the largest CSC underpayments occurred during fiscal years 1994-1998. Last October Congress included a "rider" in the FY 1999 appropriations act that mentions contract support costs owed from those years (identified as Section 314). Since that time IHS has been taking the position in other litigation that the "rider" has the effect of wiping out all claims for unpaid contract support costs arising in those years. We therefore expect that this issue will factor prominently in IHS's defense. (In fact, IHS is arguing in one case that section 314 permits IHS to take back a CSC damage award IHS had already paid into the registry of a court months before Section 314 was enacted.)

The case has been filed as a class action to recover contract support costs for all under-paid tribes. Filing the case as a class action has the effect of stopping the running of any statute of limitations against individual tribes eligible for membership in the class. If successful, it also has the effect of saving the expense of dozens of individual lawsuits, as well as reducing the risk of inconsistent court rulings on key issues. Eventually, however, it will be up to the federal court to decide whether the case can proceed in this manner. If so, all tribes will receive a formal court-approved notice of the case and of their rights. In the meantime, we as "class counsel" are alerting all tribes to the existence of the lawsuit, and we also plan to keep interested tribes abreast of all significant developments through various means (including a webpage). In the meantime, we are available to answer any questions you may have about how the lawsuit might affect your Tribe's particular situation.

Please let us know if there is any further information you would like regarding the *Cherokee v. Shalala* litigation. Feel free to call any of the attorneys listed below.

Respectfully submitted,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: Lloyd Benton Miller
William R. Perry
James E. Glaze
Devin Odell

LBM/WRP/JEG/DO/bnm
Enclosure (by mail)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[FILED: OCT 01, 1993]

No. CIV 90-0957 LH/RWM

RAMAH NAVAJO CHAPTER,
Plaintiff,

vs

MANUEL LUJAN, Secretary of the Interior;
EDDIE BROWN, Assistant Secretary of the Interior;
MARVIN PIERCE, Chief of the Office of Inspector General, U. S. Department of the Interior; and
the UNITED STATES OF AMERICA,
Defendants.

ORDER

THIS MATTER came on for consideration of Plaintiff's Motion to Certify Class Under Rule 23, filed on August 21, 1991 (Docket No. 31). The Court having reviewed the memoranda of the parties and having issued its memorandum opinion of even date, FINDS:

That Plaintiff's motion is well taken and will be granted.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Certify Class Under Rule 23 be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the plaintiff class shall include those Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

/s/ C. Leroy Hansen
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[FILED: OCT 01, 1993]

RAMAH NAVAJO CHAPTER,
Plaintiff,

vs

MANUEL LUJAN, Secretary of the Interior;
EDDIE BROWN, Assistant Secretary of the Interior;
MARVIN PIERCE, Chief of the Office of Inspector
General, U. S. Department of the Interior; and
the UNITED STATES OF AMERICA,
Defendants.

MEMORANDUM OPINION

THIS MATTER came on for consideration of Plaintiff's Motion to Certify Class Under Rule 23, filed on August 21, 1991 (Docket No. 31). Plaintiff seeks to certify as a class all Indian tribes and organizations contracting under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450) (the "Act") with the Bureau of Indian Affairs ("BIA"), who receive or are entitled to receive contract support funding based on indirect cost rates negotiated through the office of the inspector general. Having reviewed the positions of the parties and the applicable law, the Court concludes that the motion is well taken and shall be granted.

Plaintiff claims that the BIA has failed to provide statutorily mandated indirect costs to Plaintiff in an amount set forth in Section 450j-1 of the Act.

Defendants resist the motion for class certification. Defendants' principal objection is that although Plaintiff has exhausted its administrative remedies and is therefore properly before this Court, the claims of Plaintiff as representative party are not typical of the proposed class members. Specifically, Defendants argue that there is no showing that the members of the class to be certified have exhausted their administrative remedies under the Act. Defendants contend that unless the administrative remedies have been exhausted by each of the members of that class that they may not be included in the class. The theory is that the exhaustion of administrative remedies is jurisdictional and that if the remedies have not been exhausted, the Court's action regarding the class would be without jurisdiction.

The Indian Self-Determination Act provides that the United States District Court shall have concurrent jurisdiction with the United States Court of Claims over any civil action or claim against the BIA for money damages arising out of self-determination contracts authorized by the Act. The Act also provides that the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, shall apply to disputes concerning self-determination contracts. The claims being brought by Plaintiff relate to a self-determination contract with the BIA, and it is clear that the Contract Disputes Act applies to this case. Thus, decisions relating to the Contract Disputes Act are instructive in determining whether the exhaustion of remedies under that statute is a jurisdictional prerequisite to an action in this Court.

A review of the decisions of the Court of Claims or its successor, the United States Claims Court, and appeals therefrom, make clear that when a government contractor wishes to seek relief in connection with the performance of his contract, he must first submit a

claim to the agency contracting officer and receive an opinion from that official. The completion of these steps is a jurisdictional prerequisite to the filing of a complaint relative to the claim in the Court of Claims. *Thoen v. United States*, 765 F.2d 1110 (Fed. Cir. 1985); *W. M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983).

Plaintiff contends, however, that even if exhaustion of administrative remedies is a jurisdictional prerequisite, certification may still be granted if it would be futile for the potential class members to complete those jurisdictional prerequisites. The Court notes that Plaintiff has not cited, nor could it locate, any case decided under the Contract Disputes Act where exhaustion of remedies was waived as having been futile. This is not dispositive, however.

In *Association for Community Living in Colorado v. Romer*, 992 F.2d 1040 (10th Cir. 1993), a case decided under the Individuals with Disabilities Education Act ("IDEA"), the Tenth Circuit Court of Appeals concluded that a claimant under the IDEA need not exhaust its remedies if exhaustion would be futile or would fail to provide adequate relief, or where an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law. *Id.*, 992 F.2d 1040, 1044.

"Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms." *Id.*

The *Romer* case, along with the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988) are instructive. The Court notes that Plaintiff's action does not concern a typical contract dispute wherein issues of performance need be addressed. If that were the case, the purposes behind exhaustion of administrative

remedies would require that the contract claim first be brought to the attention of an agency contracting officer.[1] Instead, Plaintiff's action challenges the policies and practices adopted by the BIA as being contrary to the law and seeks to make systemwide reforms. In such a case as this, exhaustion of administrative remedies is not required.

In light of the above, it is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act. The Court will therefore certify the class to include all Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

An order in accordance with this memorandum opinion shall be entered.

/s/ C. Leroy Hansen
UNITED STATES DISTRICT JUDGE

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[1] In *Romer*, the Court noted that exhaustion of administrative remedies under the IDEA serves the following important purposes: "(1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress; and (4) avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any error." *Romer*, 992 F.2d 1040, 1044 (*quoting Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 812 (10th Cir. 1989) (decided under the Education of the Handicapped Act).

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EXHIBIT B

MENOMINEE TRIBE'S 1996
SELF-DETERMINATION AGREEMENT
WITH IHS CONTRACT # 239-96-0030
EFFECTIVE DATE: JANUARY 1, 1996

INDIAN SELF-DETERMINATION AGREEMENT
BETWEEN THE
MENOMINEE INDIAN TRIBE OF WISCONSIN
AND THE
DEPARTMENT OF HEALTH AND HUMAN
SERVICES INDIAN HEALTH SERVICE

BEMIDJI AREA OFFICE
[LOGO]
IHS

EFFECTIVE AS OF JANUARY 1, 1996

INS CONTRACT NUMBER 239-96-0030

SELF-DETERMINATION CONTRACT MODEL
AGREEMENT BETWEEN THE SECRETARY
HEALTH AND HUMAN SERVICES AND THE
THE MENOMINEE TRIBE OF WISCONSIN

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(a) AUTHORITY AND PURPOSE

(1) AUTHORITY

This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of Health and Human Service (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et. seq.) and by the authority of the Menominee Tribal Government (referred to in this agreement as the "Contractor". The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

(2) PURPOSE

Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et. seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions,

services, activities, and programs (or portions thereof), that are otherwise contractible under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor:

Utilizing the Tribally owned health facility at the Menominee Tribal Clinic, located in Keshena, Wisconsin, the areas of education, prevention, health care maintenance and intervention will be stressed. Components of the Health Center Program will include:

I. Administrative Services

II. Ambulatory Services:

A. Medical Services, including:

1. Physicians
2. Nurse Practitioner (NP)
3. Pharmacy Services
4. Laboratory Services
5. Ambulatory Care Nursing
6. Medical and Technical Relief Coverage including: Medical Director, Radiology Technicians, Dentists, Hospital Coverage-Physicians, Nutritionist, Psychotherapists.
7. X-ray Services

B. Dental Services (Direct and Contract Health)

C. Audiology

D. Clinic/Program Administration

E. Contract Health Services (CHS) including Inpatient, Outpatient, and Optical.

F. Patient Transportation Services

G. Emergency Medical Services

III. Preventive Health Services:

A. Dental Prevention Services

B. Environmental Health and Sanitarian Services

C. Public Health Nursing Services (CHNS)

D. Nutrition Services

E. Human Resource Center (HRC)

[1] Mental Health and Social Services

F. Healthy Heart Program

G. Health Promotion Disease Prevention

H. Aids Prevention and Aids Health Education

I. Wellness

J. Maternal Child Health/CHR

K. Family Planning Services

(b) TERMS, PROVISIONS, AND CONDITIONS

(1) TERMS

Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1), term of this contract shall be indefinite, until cancelled by Tribal Legislative action. Pursuant to section 105(d)(1) of such Act (25 U.S.C.j.(d), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

(2) EFFECTIVE DATE

This Contract shall become effective upon the date of the approval and execution by the Contractor and the secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

The effective date of this agreement shall be January 1, 1996.

(3) PROGRAM STANDARD

The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards:

Joint Commission on Accreditation of Health Care Organizations.

(4) FUNDING AMOUNT

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 405j-1).

(5) LIMITATION OF COSTS

The Contractor shall not be obligated to continue performance that requires and expenditure of funds in excess of the amount of funds awarded under this contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this contract or a specific activity conducted under this contract, the Contractor shall provide

reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this contract, the Contractor may suspend performance of the Contract until such time additional funds are awarded.

(6) Payment

(A) In General

Payments to the Contractor under this contract shall—

(i) be made as expeditiously as practicable; and

(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

(B) QUARTERLY, SEMIANNUAL, LUMP-SUM AND OTHER METHODS OF PAYMENTS

(i) In General

Pursuant to Section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total fiscal year, in a lump-sum payment or as semi-annual payments, or any other method of payment authorized by law, in accordance with such method as may be

requested by the Contractor and specified in the annual funding agreement.

(ii) Method of Quarterly Payment

If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment made pursuant to clause (a) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the contract year coincided with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this contract.

(iii) Applicability

Chapter 39 of Title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

(7) Records and Monitoring

(A) In General

Except for previously provided copies of tribal records that the Secretary demonstrates are clearly required to be maintained as part of the record-keeping system of the Department of the Interior or the Department of Health and Human Services (or both), records of the Contractor shall not be considered Federal records for purposes of Chapter 5 of Title 5, United States Code.

(B) Recordkeeping System

The Contractor shall maintain a recordkeeping system and, upon reasonable advance request, provide reasonable access to such records to the Secretary.

(C) Responsibilities of Contractor

The Contractor shall be responsible for managing the day-to-day operations conducted under this Contract and for monitoring activities conducted under this Contract to ensure compliance with the contract and applicable Federal requirements. With respect to the monitoring activities of the Secretary, the routine monitoring visits shall be limited to not more than one performance monitoring visit for this contract by the head of each operating departmental bureau, or departmental agency, or duly authorized representative of such head unless—

(i) the Contractor agrees to one or more additional visits; or

(ii) the appropriate official determines that there is a reasonable cause to believe that grounds for reassumption of the Contract, suspension of contract payments, or other serious contract performance deficiency may exist.

No additional visit referred to in clause (ii) shall be made until such time as reasonable advance notice that includes a description of the nature of the problem that requires the additional visit has been given to the Contractor.

(8) Property

(A) In General

As provided in Section 105(f) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j (f), at the request of the Contractor, the Secretary may make available, or to the Contractor, all reasonable divisible real property, facilities, equipment, and personal property that the Secretary has used to provide or administer the programs, services, functions, and activities covered by this contract. A mutually agreed upon list specifying the property, facilities, and equipment so furnished shall also be prepared by the Secretary, with the concurrence of the Contractor, and periodically revised by the Secretary, with the concurrence of the Contractor.

(B) Records

The Contractor shall maintain a record of all property referred to in subparagraph (A) or other property acquired by the Contractor under Section 105(f)(2)A of such Act for purposes of replacement.

(C) Joint Use Agreements

Upon the request of the Contractor, the Secretary and the Contractor shall enter into a separate joint use agreement to address the shared use by the parties of real or personal property that is not reasonably divisible.

(D) Acquisition of Property

The Contractor is granted the authority to acquire such excess property as the Contractor may determine to be appropriate in the judgement of the Contractor to support the programs, services,

functions, and activities operated pursuant to this contract.

(E) Confiscated or Excess Property

The Secretary shall assist the Contractor in obtaining such confiscated or excess property as may become available to tribes, tribal organizations, or local governments.

(F) Screener Identification Card

A screener identification card (General Services Administration form 2946) shall be issued to the Contractor not later than the effective date of this contract. The designated official shall, upon request, assist the Contractor in securing the use of the card.

(G) Capital Equipment

The Contractor shall determine the capital equipment, leases, rentals, property, or services the Contractor requires to perform the obligations of the Contractor under this subsection, and shall acquire and maintain records of such capital equipment, property rentals, leases, property, or services through applicable procurement procedures of the Contractor.

(9) Availability of Funds

Notwithstanding any other provision of law, any funds provided under this contract—

(A) shall remain available until expended; and

(B) with respect to such funds, no further—

(i) approval by the Secretary, or

(ii) justifying documentation from the Contractor, shall be required prior to the expenditure of such funds.

(10) Transportation

Beginning on the effective date of this contract, the Secretary shall authorize the Contractor to obtain interagency motor pool vehicles and related services for performance of any activities carried out under this Contract.

(11) Federal Program Guidelines Manuals or Policy Directives

Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et. seq.) the Contractor is not required to abide by program guidelines, manuals, or policy 'directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

(12) Disputes

(A) Third-Party Mediation Defined

For the purposes of this contract, the term "third-party mediation" means a form of mediation whereby the Secretary and the Contractor nominate a third party who is not employed by or significantly involved with the Secretary of the Interior, the Secretary of Health and Human Services, or the Contractor, to serve as a third-party mediator to mediate disputes under this contract.

(B) Alternative Procedures

In addition to, or an alternative to, remedies and procedures prescribed by Section 110 of the Indian

Self-Determination and Education Assistance Act (25 U.S.C. 450m-1), the parties to this Contract may jointly—

(i) submit disputes under this contract to third-party mediation;

(ii) submit the dispute to the adjudicatory body of the Contractor including the tribal court of the Contractor.

(iii) submit the dispute to mediation processes provided for under the laws, policies, or procedures of the Contractor; or

(iv) use the administrative dispute resolution processes authorized in Subchapter IV of Chapter 5 of Title 5, United States Code.

(C) Effect of Decisions

The Secretary shall be bound by decisions made pursuant to the processes set forth in subparagraph (B), except that the Secretary shall not be bound by any decision that significantly conflicts with the interest of Indians or the United States.

(13) Administrative Procedures of Contractor

Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 et seq.) the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this contract.

(14) Successor Annual Funding Agreement

(A) In General

Negotiations for a successor annual funding agreement, provided for in subsection (f)(2) shall begin not later than 120 days prior to the conclusion of the preceding annual funding agreement. Except as provided in Section 105(c)(2) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(2) the funding for each such successor annual funding agreement shall only be reduced pursuant to Section 106(b) of such Act (25 U.S.C. 450j-1(b)).

(B) Information

The Secretary shall prepare and supply relevant information, and promptly comply with any request by the Contractor for information that the Contractor reasonably needs to determine the amount of funds that may be available for a successor annual funding agreement, as provided for in subsection (f)(2) of this Contract.

(15) Contract Requirements; Approval by Secretary

(A) In General

Except as provided in subparagraph (B) for the term of the Contract, section 2103 of the Revised Statutes (25 U.S.C. 81) and section 16 of the Act of June 18, 1934 (48 stat. 987, chapter 576), shall not apply to any contract entered into in connection with this contract.

(B) Requirements

Each contract entered into by the Contractor with a third party in connection with performing the obligation of the Contractor under this contract shall—

(i) be in writing

(ii) identify the interested parties, the authorities of such parties, and purposes of the contract;

(iii) state the work to be performed under the contract; and

(iv) state the process for making any claim, the payments to be made, and the term of the Contract', which shall be fixed.

(c) OBLIGATIONS OF THE CONTRACTOR

(1) Contract Performance

Except as provided in subsection d(2), the Contractor shall perform the programs; services, functions, and activities as provided in the annual funding agreement under subsection f(2) of this contract.

(2) Amount of Funds

The total amount of funds to be paid under this contract pursuant to

Section 106 (a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this contract.

(3) Contracted Programs

Subject to the availability of appropriated funds, the Contractor shall administer the programs, services, functions and activities identified in this contract and funded through the annual funding agreement under section f(2).

(4) Trust Services for Individual Indians

(A) In General

To the extent that the annual funding agreement provides funding for' the delivery of trust services to individual Indians that were formerly provided by the Secretary, the Contractor shall maintain at least the same level of service as was previously provided by the Secretary, subject to the availability of appropriated funds for such services.

(B) Trust Services to individual Indians

For the purposes of this paragraph only, the term "trust services for individual Indians" means only those services that pertain to land or financial management connected to individually held allotments.

(5) Fair and Uniform Services

The Contractor shall provide services under this contract in fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the contract.

(d) OBLIGATION OF THE UNITED STATES

(1) Trust Responsibility

(A) In General

The United States reaffirms its trust responsibility to the Menominee Indian Tribe of Wisconsin to protect and conserve the trust resources of the Indian tribes and of individual Indians.

(B) Construction of the Contract

Nothing in this contract is intended to, nor shall be construed, to terminate, waive, modify, or reduce the trust responsibility of the United

States to the tribes or individual Indians. The Secretary shall act in good faith in upholding said trust responsibility.

(2) Good Faith

To the extent that health programs are included this contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in Chapter 18 of Title 25, United States Code.

(3) Program Retained

As specified in the annual funding agreement, the United States hereby retains the programs, services, functions, and activities with respect to the tribe(s) that are not specifically assumed by the Contractor in annual funding agreement under subsection f(2).

(e) OTHER PROVISIONS

(1) Designated Officials

Not later than the effective date of this contract, the United States shall provide to the Contractor, and the Contractor shall provide to the United States, a written designation of a senior official to serve as a representative for notices, proposed amendments to the contract, and other purposes for this contract.

(2) Contract Modifications or Amendments

(A) In General

Except as provided in subparagraph (B), no modification to this contract shall take effect unless such modification is made in the form of a written amendment to the contract, and the Contractor and the Secretary provide written consent for the modification.

(B) Exception

The addition of supplement funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2), shall not be subject to subparagraph (A).

(3) Officials not to Benefit

No member of Congress, or resident commissioner, shall be admitted to any share or part of any contract executed pursuant to this contract, or to any benefit that may arise from such contract. This paragraph may not be construed to apply to any contract with a third party entered into under this contract if such contract is made with a corporation for general benefit of the corporation.

(4) Covenant Against Contingent Fees

The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this contract upon on agreement, or understanding for a commission percentage, brokerage, or contingent fee, excepting bonafide employees or bonafide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

(f) ATTACHMENTS

(1) Approval of Contract

Unless previously furnished to the Secretary, the resolution of the Menominee Indian Tribe authorizing the contracting of the programs, services, functions, and activities identified in this contract is attached to this contract as attachment 1.

(2) Annual Funding Agreement

(A) In General

The annual funding agreement under this contract shall only contain—

(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other then those provided by the Secretary), to which the parties agree.

(B) Incorporation by Reference

The annual funding agreement is hereby incorporated in its entirety in this contract and attached to this contract as attachment 2.

Dated this 21st day of December, 1995

Menominee Indian Tribe of Wisconsin

By /s/ Betty Jo Woziak
(Designated Tribal Official)

United States of America, Department of Health and Human Services, Indian Health Service

By /s/ Kathleen Annello MD
Area Director, Bemidji Area
Indian Health Services

By /s/ Dennis Murphy
Contracting Officer, Bemidji Area
Indian Health Service

ATTACHMENT 2 (ANNUAL FUNDING AGREEMENT) TO MENOMINEE TRIBE'S 1996 SELF-DETERMINATION AGREEMENT WITH IHS CONTRACT # 239-96-0030

AFA EFFECTIVE DATES: JANUARY 1, 1996 – DECEMBER 31, 1996

ATTACHMENT 2

TO INDIAN SELF-DETERMINATION AGREEMENT

IHS CONTRACT NUMBER 239-96-0030

ANNUAL FUNDING AGREEMENT BETWEEN THE SECRETARY OF HEALTH AND HUMAN SERVICES AND THE MENOMINEE INDIAN TRIBE OF WISCONSIN

BEMIDJI AREA OFFICE

[LOGO]

IHS

JANUARY 1, 1996 - DECEMBER 31, 1996

Section 1 - Purpose

This Annual Funding Agreement is entered into by the MENOMINEE INDIAN TRIBE OF WISCONSIN (referred to in this agreement as Contractor) and the U.S. Department of Health and Human Services, Indian Health Service (referred to in this agreement as IHS) in accordance with Sec. 108 (25 USC 4501) (c) Section 1, (f)(2) and pursuant to the Self-Determination Model Agreement No.

23996-0030 dated January 1, 1996, under the provisions of Title 1 of P.L. 93-638, as amended.

Section 2 - List of Programs, Functions, Services, and Activities to be Performed

The Contractor agrees to provide the programs, functions, services, and activities (PFSA) as consolidated under the general budget categories listed below and in accordance with the Program Standards listed in the Model Agreement:

I. Administrative Services

II. Ambulatory Services:

A. Medical Services, including:

1. Physicians
2. Nurse Practitioner (NP)
3. Pharmacy Services
4. Laboratory Services
5. Ambulatory Care Nursing
6. Medical and Technical Relief Coverage including: Medical Director, Radiology Technicians, Dentists, Hospital Coverage-Physicians, Nutritionist, Psychotherapists.
7 X-ray Services

B. Dental Services (Direct and Contract Health)

C. Audiology

D. Clinic/Program Administration

E. Contract Health Services (CHS) including Inpatient, Outpatient, and Optical.

F. Patient Transportation Services

G. Emergency Medical Services

III. Preventive Health Services:

A. Dental Prevention Services

B. Environmental Health and Sanitarian Services

C. Public Health Nursing Services (CHNS)

D. Nutrition Services

E. Human Resource Center (HRC)

[1] Mental Health and Social Services

F. Healthy Heart Program

G. Health Promotion Disease Prevention

H. Aids Prevention and Aids Health Education

I. Wellness

J. Maternal Child Health/CHR

K. Family Planning Services

Section 3 - Funds to be Provided

The funding amounts available to the Contractor for the period of this annual funding agreement shall be as follows:

a. Budget Period

1/1/96 - 12/31/96 Estimated FY '96 Funds

H/C	7560390	J461151	6-39146.61	25.82	$1,944,000
CSC/Dir/25.81	7560390	J461170	6-39846.61	25.81	152,100
CSC/IDC/MIST	7560390	J461170	6-39846.61	25.85	319,230
MH	7560390	J461169	6-39146.63	25.82	5,000
CMS	75-6/7-0390	J46JP75	6-56046.66	25.82	1,002,400
DENTAL	7560390	J461164	6-39146.62	25.82	39,900
PHN (new)	7560390	J461171	6-39246.72	25.82	3,000
					$3,465,630

Note: (1) BAO will withhold an additional $266,100 of H/C funds for C.O. detail of: MD, Colman

$71,400; MD, Culhane $64,900; MD, Exner $74,500; M.D. Holcomb $55,300; for the period 10-1-95 thru 9-30-96.

(2) The CSC IDC historical amount is $319,230 and is considered non-recurring and must be used for indirect cost only.

Section 4 - Time and Method of Payment

The time and method of payment of funds to the Contractor for the operation and administration of the programs, functions, services and activities identified under this agreement shall be as follows:

1. As requested by the Tribe and authorized by section (a) (6) (B) or the Model Agreement, for all programs of a recurring nature for which amounts have been determined prior to the beginning of the Annual Funding Agreement (AFA) Year the Secretary shall provide a single lump sum payment as of the first day of the AFA Year or as soon thereafter as practicable or reasonably possible.

2. In the event of a "Continuing Resolution" the Secretary will provide the maximum funding allowed.

Section 5 - Brief Description of PFSA to be Provided

Programs, Services, Function, and Activities. The Contractor shall operate the following programs:

A. Administrative Services

I. Administration - The Menominee Indian Tribe and its delegate Socio-Economic Committee is responsible for overall operation of the Tribal comprehensive health program, which is under the administrative

supervision of the Tribal Health Administrator and medical direction by the medical director. Responsibilities include planning and developing organizational objectives, designing operational plans and establishing policy, allocating resources, organizing work processes, staffing, retaining human resources, directing, controlling, and monitoring organizational activities.

2. Medical Records - Maintains all outpatient health care records in POMR format, transcribes progress notes, handles record transfers to and from the Menominee Tribal Clinic, provides coding and pricing for all route slips, ensures patient records are maintained in a standardized format according to policy, processes, monitors, and submits ambulatory patient care data to appropriate IHS agency. Ensures proper registration of all patients utilizing services at the clinic.

3. Billing - Maintains patient. account information such as demographic and insurance coverage through patient registration, processes all service charges and reimbursements for care, tracks third party billings, provides management data for cash flow projections, utilizes and maintains a computer system for processing, all billing components, maintains computer security, and provides periodic software upgrades.

4. Contract Health Services - A contract health service program is operated for all eligible individuals residing within the

Menominee Tribal Clinic's service delivery area. This includes procurement of health services not available at the clinic. Clinic physicians make referrals to designated preferred health care providers. A CHS policy and procedure manual defines department operations.

5. Maintenance and Housekeeping - Maintenance and housekeeping is responsible for the repair, maintenance and cleaning of the entire health care facility.

B. Direct Medical Care

1. Medical Services - Direct patient care consists of physician and nursing services. Medical care services are directed by an Medical Director who directs patient care at the outpatient clinic. The ambulatory nursing component consists of state licensed registered nurses (RNs) and licensed practical nurses (LPNS). Departmental operations are governed by the medical department's policy and procedure manual.

2. Laboratory Services - Two medical technologists and a laboratory aide provide laboratory services under the direct supervision of staff physicians. The laboratory performs a variety of diagnostic tests, including routine chemistry, urinalysis, hematology, bacteriology, coagulation, endocrinology, and immunology. Outside reference laboratories are utilized for specialized testing. An approved laboratory

policy and procedure manual plan governs the laboratory operation.

3. Radiology Services - An x-ray technologist provides routine diagnostic x-rays of the musculoskeleton as ordered by staff physicians. Established protocols are defined in the radiology department's polity and procedure manual.

4. Pharmacy - The pharmacy department is staffed by three pharmacists and two pharmacy technicians. The pharmacy service promotes the rational use of pharmaceutical products within community health and patient care management plans; the correct dispensing, use and administration of pharmaceutical products by patients; clinical staff consultation and monitoring and off site pharmacy services monitoring. The pharmacy is responsible for obtaining pharmaceutical drugs from appropriate sources according to standard procedures. Dispensing, counseling and related services shall be provided on receipt of authorized prescriptions from approved health center and subcontract medical (off site) and dental providers. Department operations are defined in a pharmacy policy and procedure manual.

5. Women's Personal Health - The Women's Personal Health Program is staffed by a registered nurse and an outreach worker. Services offered include pregnancy testing, reproductive health, birthcontrol counseling, follow-up on sexually transmitted disease and abnormal pap smears, prenatal

education, childbirth preparation classes, and postpartum/postnatal services to women of all ages. The WPH program is a direct service program under this contract with funding support from contract income. Program direction and supervision is provided by the health administrator and designated staff.

6. Emergency Medical Services - The emergency medical services department provides twenty four hour emergency medical service to the reservation/county. It is staffed by state licensed emergency medical technicians. Levels of care are provided at the EMT Basic, EMT defibrillation and EMT advanced airway levels. An EMS policies and procedures manual governs the operation. The EMS program is a direct service program under this contract with funding support from contract income. Program direction and supervision is provided by the health director and designated staff.

C. Dental

1. Dental - The dental department is staffed by three dentists, a dental hygienist, five dental assistants and a dental receptionists. Program services encompass the total practice of general dentistry. Dental hygiene services including education and preventative planning activities are provided by a full time dental hygienist. The dental policy and procedures manual defines the scope of services.

D. Community Health

1. Environmental Health - An environmental health specialist (sanitarian) is employed to plan, organize, and direct a comprehensive program to identify and address environmental conditions which may effect the health of the Menominee Indian Reservation residents. These areas include, community injury control, water quality, waste management, food, celebrations, institutional environmental health, vector control, recreational sanitation, epidemiological investigations, emergency situations, promotion of tribal codes and ordinances, industrial hygiene, operation and maintenance activities, general administrative activities, annual environmental planning, construction, radon testing and mitigation.

2. Community Health Nursing Service - Community health nursing provides services in coordination with the staff physicians. The community health nurse incorporates into practice knowledge of clinical nursing, community and social organization, ecology, biological, psychological, and social sciences. The primary focus of community health nursing is the prevention of illness, the promotion and maintenance of health and the provision of needed therapeutic services. A policy and procedures manual defines department operations.

3. Human Resource Center - The HRC department is responsible for providing

outpatient mental health services. Individual, family and group therapy is available for family difficulties, marital problems, separation and divorce, parent-child difficulties, depression, anxiety, suicidal thoughts or actions, and school behavior problems. The department is staffed by two masters level psychologists and two masters level clinical social workers. A departmental policy and procedures manual governs program operations.

4. Optical - The optical department is staffed by two contracted optometrists, licensed by the Wisconsin State Optometry Board of Examiners. The following services are provided: eye examinations, eye glasses and contact lens. A departmental policy and procedures manual defines program operations.

5. Nutrition - A registered dietician provides nutrition education and counseling services for the Menominee community.

6. Audiology - An audiologist consultant is contracted to provide a full range of audiology screening, testing and referral services for the Menominee community.

7. Healthy Heart - The healthy heart program is directed by a registered nurse and a health fitness instructor. The program is aimed at reducing the high prevalence of cardiovascular disease for the Menominee People. Prevention activities will be continued and new wellness programs will be

developed to reduce the risk of cardiovascular disease of people of all ages (children, youth, and adults) that take place in multiple settings (schools, work sites, and community).

Section 6 - Other Provisions to which Parties Agree

1. Reporting Requirements

   a. For each fiscal year which the Contractor receives or expends funds pursuant to P.L. 93-638, the Contractor shall submit to the Secretary a single agency audit report required by Chapter 75 of Title 31, United States Code.

   b. The Contractor shall make an annual report to the Indian people in fulfillment of the Sec. 5(c) of P.L. 93-638 requirement for reports and information to Indian people. This annual report will include the PFSA provided and the costs incurred. A copy of this report will also be provided to IHS.

   c. Resource Patient Management System (RPMS) (Automated)

      (1) Patient Registration

      (2) Patient Care Component (medical)

      (3) Patient Care Component (dental)

      (4) Patient Care Component (Pharmacy)

      (4) Contract Health Services (2.0)

      (5) Immunization Report

      (6) Community Health Activity Report (PHN)

d. Mental Health Report/Social Service System. Submit Quarterly to Area Mental Health Coordinator (Note: RPMS system being implemented MH/PCC)

e. Environmental Health Reporting System (Manual) Submit to Area Chief Environmental Health Services Branch

f. IHS Headquarters PFSA/Tribal Shares

1. The initial FY '96 AFA does not include IHS Headquarter's PFSA/Tribal Shares Funding with the agreement that PFSA and related funds will be incorporated by amendment as the negotiations are completed and funding is made available to the Area Office.

2. The IHS Headquarters PFSA/Tribal Share calculation shall be provided to the Menominee Tribe for consideration. It is understood that the IHS may not be able to contract the total calculated PFSA/Tribal Shares during FY '96. It is anticipated that negotiations and decisions regarding available PFSA/Tribal Shares will be completed within 90 days of the initial. AFA effective date.

g. Bemidji Area PFSA/Tribal Shares

1. The initial FY '96 AFA does not include Bemidji Area PFSA/Tribal Shares funding with the agreement that PFSA and related funds will be incorporated by amendment as these negotiations are completed.

2. Subject to negotiations and Tribal concurrence, the Bemidji Area PFSA/Tribal Shares for FY '96 are based on the Bemidji Area Title I

PFSA/Tribal Share calculations. It is understood that the Bemidji Area will not be able to contract the total calculated PFSA/Tribal Shares during FY'96. Area Office Shares funding is proposed at 25% of calculated shares.

3. Subject to Negotiations, the Bemidji Area proposes to retain 75% of the calculated PFSA/Tribal share amount of the Bemidji Area office and shall continue to provide the same level of service and support available to all Tribal operated programs under Title I.

4. The calculated (Wisconsin Field Office) PFSA/Tribal Share of $37,064 is included in the GLITC Health Service Annual Funding Agreement for the period ending 9/31/96.

h. Other Retained PFSA/Tribal Shares

1. Bio-med services calculated at $6,400 is retained for services provided by Area bio-med technician and Area bio-med equipment related support.

2. The Term of this Annual Funding Agreement shall be for the period January 1, 1996 thru December 31, 1996.

Dated this 21st day of December, 1995

Menominee Indian Tribe of Wisconsin

By /s/ Betty Jo Woziak
Designated Official

United States of America, Department of Health and Human Services, Indian Health Service

By /s/ Dennis Murphy
Contracting Officer, Bemidji Area Office,
Indian Health Service

MODIFICATION No. 5 to MENOMINEE'S
1996 AFA
CONTRACT No. 239-96-0030
MODIFICATION EFFECTIVE DATES:
1/1/96-12/30/96

ANNUAL FUNDING AGREEMENT
MODIFICATION

REQUISITION NO. 96-50-1198
Page 1 of 2

AGREEMENT NO. 239-96-0030
MODIFICATION NO. 96-05
EFFECTIVE: January 1, 1996 - December 30, 1996

ISSUED BY:

Indian Health Service
Bemidji Area Office
Room 211, Federal Building
Bemidiji, Minnesota 56601

CONTRACTOR:

Menominee Indian Tribe of Wisconsin
P.O. Box 970
Keshena, WI 54135

AUTHORITY: 25 USC 450(g), P.L. 93-638, as Amended

A. AFA No. 239-96-0030 is hereby modified to increase the contract amount by $217,104 which reflects increases for: Bemidji Area Title I Shares ($50,343), Headquarters Title I Tribal Shares ($104,064), CHS Deferred Services ($3,500), M&I funding ($59,197) and non-recurring FY '96 CSC/IDC Shortfall ($30,000).

B. Section 3, Funds to be Provided, of the AFA is revised to included the funding increase of $247,104.

Section 3 - Funds to be Provided

The funding amounts available to the Contractor for this annual funding agreement shall be as follows:

C. ACCOUNTING AND APPROPRIATION DATA is changed to read as follows:

Budget Period 1/1/96 - 12/31/96

H/C	7560390	J461151	6-39146.61	25.82	55.75	$ 945,818	(+67,941 +50,343)
H/C	7560390	J461151	6-39146.61	25.82	"	1,987,100	
CSCDir	7560390	J461170	6-39846.61	25.81	"	152,100	
CSC/IDC	7560390	J461170	6-39846.61	25.85	"	348,230	(30,000)
MltbEdHQ	7560390	J461162	6-39246.73	25.82	"	4,127	(4,127)
AlcHQ	7560390	J461159	6-39146.64	25.82	"	11,588	(+11,588)
MH	7560390	J461168	6-39146.63	25.82	"	6,835	(+ 1,535)
CHS	75-6/7-0390	J46ZJ75	6-56046.88	25.82	"	1,011,293	(+ 5,393 + 3,500)
CHR/HQ	7560390	J461173	6-39246.74	25.82	"	7,638	(+ 7,638)
DENTAL	7560390	J461164	6-39146.62	25.82	"	47,924	(+ 2,524)
PHN	7560390	J461171	6-39246.72	25.82	"	6,418	(+ 3,318)
MAI	75X0391	J461167	6-29040.76	25.82	"	59,197	(+59,197)
OEH/IPP	75X0391	J461168	6-29246.77	25.82	"	3,100	
EH/EQUI	75X0391	J461172	6-29646.71	25.82	"	128,941	
				Total		$4,721,109	(+247,104)

D. The Model Agreement total amount is hereby increased by $247,104 from $4,474,005 to $4,721,109 by reason of this modification.

E. Section 6 - Other Provisions to Which Parties Agree of subject AFA is revised to add the following as:

i. Bemidji Area FY '96 PFSA/Tribal Shares

1. The Annual Funding Agreement is modified to incorporate Bemidji Area PFSA/Tribal Shares. The tribe has accepted the Bemidji Area Office PFSA/ Tribal Share calculations for Title I at 25%

of the amount calculated for Area Office PFSA/Tribal Shares. The resulting funding of $50,343 shall be used to augment and support Health Programs operations.

2. The AFA excludes $37,064 pro-rated share of the base field office portion of the Bemidji Area calculated PFSA/Tribal Shares for FY '96 Title I. Funding is included in the Great Lakes Inter-Tribal Council Field Office service contract for the period 10/1/95-6/30/96.

j. IHS Headquarters PFSA/Tribal Shares

The Annual Funding Agreement is modified to incorporate programs, functions, services, and activities (PFSA) otherwise managed or operated by IHS Headquarters. The tribe and health program will assume PFSA and related funding in the amount of $104,064 identified in the FY '96 Title I spreadsheet.

F. There are no other changes to this AFA by reason of this modification.

G. a. _____

Contractor Name/Title (Optional)

G.b. /s/ Betty Jo Woziak

Contractor
Signature and Date (Optional)

H.a. DENNIS MURPHY

Contracting Officer

H.b. /s/ Dennis Murphy 9/24/96

Contracting Officer
Signature and Date

EXHIBIT C

MENOMINEE TRIBE'S ATTACHMENT 2-97
TO IHS CONTRACT No. 239-96-0030 AFA
EFFECTIVE: 1/1/97-12/31/97

ATTACHMENT 2-97
TO INDIAN SELF-DETERMINATION
AGREEMENT
IHS CONTRACT NUMBER 239-96-0030
ANNUAL FUNDING AGREEMENT
BETWEEN THE SECRETARY OF HEALTH AND
HUMAN SERVICES AND
THE MENOMINEE INDIAN TRIBE OF WISCONSIN

BEMIDJI AREA OFFICE
[LOGO]
IHS

JANUARY 1, 1997-DECEMBER 31, 1997

ANNUAL FUNDING AGREEMENT
BETWEEN THE
MENOMINEE INDIAN TRIBE OF WISCONSIN
AND THE DEPARTMENT OF HEALTH AND
HUMAN SERVICES
JANUARY 1, 1997 - DECEMBER 31, 1997

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1. PURPOSE
2. LIST OF PROGRAMS, FUNCTIONS, SERVICES, AND ACTIVITIES TO BE PERFORMED
3. FUNDS TO BE PROVIDED
4. TIME AND METHOD OF PAYMENT
5. BRIEF DESCRIPTION OF PFSA'S TO BE PROVIDED
6. OTHER PROVISIONS TO WHICH PARTIES AGREE

ATTACHMENT A - TRIBAL BUDGET

Section 1 Purpose

This Annual Funding Agreement is entered into by the Menominee Indian Tribe of Wisconsin (referred to in this agreement as Contractor) and the U.S. Department of Health and Human Services, Indian Health Service (referred to in this agreement as IHS) in accordance with Sec. 108 (25 USC 4501) © Section 1, (f), (2) and pursuant to the Self-Determination Model Agreement No. 239-96-0030, dated January 1, 1996, under the provisions of Title I of P.L. 93-638, as amended.

Section 2 List of Programs, Functions, Services, and Activities to be Performed

The Menominee Indian Tribe, hereinafter referred to as Contractor shall continue to administer and

operate the Menominee Tribal Health Services Program on the Menominee Indian Reservation utilizing the tribal health facility at Keshena, Wisconsin. The Menominee Health Center is fully accredited by the Joint Commission of Accreditation of Hospital Organizations (JCAHO). The purpose of this comprehensive health service program is to provide high quality ambulatory medical, dental, community health services, and the administration thereof for eligible individuals residing within the target area. The Contractor may also provide services to non-beneficiaries on a fee-for-service basis as authorized by IHS Manual 2-4.3 I (emergency cases) and IHS Manual 2-3.3 J (non-emergency cases).1.

The Contractor agrees to provide the programs, functions, services, and activities (PFSA) as consolidated under the general budget categories listed below and in accordance with the Program Standards listed in the Model Agreement:

A. Administrative Services

B. Ambulatory Services:

1. Medical Services, including:

a. Physicians

b. Nurse Practitioner (NP)

c. Pharmacy Services

d Laboratory Services

e. Ambulatory Care - Nursing

f. Medical and Technical Relief Coverage including: Medical Director, Radiology Technicians, Dentists, Hospital Coverage-Physician, Nutritionist, Psychotherapists

2. Dental Services (Direct and Contract Health)
3. Audiology
4. Clinic/Program Administration
5. Contract Health Services (CHS), including Inpatient, Outpatient, and Optical.
6. Patient Transportation Services
7 Emergency Medical Services

C. Preventive Health Services:

1. Dental Prevention Services
2. Environmental Health and Sanitarian Services
3. Public Health Nursing Services (CHNS)
4 Nutrition Services
5. Human Resource Center (HRC)
   a. Mental Health and Social Services
6. Healthy Heart Program
7. Health Promotion Disease Prevention
8. Aids Prevention and Aids Health Education
9. Wellness
10. Maternal Child Health/CHR
11. Family Planning Services

Section 3 Funds to be Provided

The funding amounts available to the Contractor for the period of this annual funding agreement shall be as follows:

a. 1/1/97 - 12/31/97

						Estimated '97 Amount
H/C	7570390	J461151	7-39146.61	41.8B	55.75	$1,951,200
DIR/CSC	7570390	J461170	7-39846.61	41.8A	55.75	152,100
IDC/CSC	7570390	J461170	7-39846.61	41.8E	55.75	319,200
MH	7570390	J461169	7-39146.63	41.8B	55.75	5,100
CHS	75-7/8-0390	J46ZK75	7-39146.66	41.8B	55.75	1,002,400
DEN	7570390	J461164	7-57046.66	41.8B	55.75	39,900
PHN	7570390	J461171	7-39246.72	41.8B	55.75	3,000
			TOTAL			$3,472,900

Note: (1) BAO will withhold $318,900 of H/C funds for C.O. detail of MD, Colman $57,000; MD, Culhane $86,000; MD, Exner $122,000; and, MD, Holcomb $53,900 for the period 10/1/96 thru 9/30/97.

BAO will also withhold $8,700 for BIO-Med services.

(2) The CSC IDC historical amount is $319,200 and is considered non-recurring and must be used for indirect costs only.

Section 4 Time and Method of Payment

The time and method of payment of funds to the Contractor for the operation and administration of the programs, functions, services, and activities identified under this agreement shall be as follows:

1. As requested by the Tribe and authorized by section (a)(6)(B) or the Model Agreement, for all programs of a recurring nature for which amounts have been determined prior to the beginning of the Annual Funding Agreement

(AFA) Year the Secretary shall provide a single lump sum payment as of the first day of the AFA year or as soon thereafter as practicable or possible.

2 In the event of a "Continuing Resolution", the Secretary will provide the maximum funding allowed.

Section 5 Brief Description of PFSA's to be Provided

Programs, Functions, Services and Activities. The Contractor shall operate the following programs:

1. Administrative Services

   a. Administration - The Menominee Indian Tribe and its delegate Socio-Economic Committee is responsible for overall operation of the tribal comprehensive health program, which is under the administrative supervision of the Tribal Health Administrator and medical direction by the Medical Director. Responsibilities include planning and developing organization objectives, designing operational plans and establishing policy, allocating resources, organizing work processes, staffing, retaining human resources, directing, controlling, and monitoring organizational activities.

   b. Medical Records - Maintains all outpatient health care records in POMR format, transcribes progress notes, handles record transfers to and from the Menominee Tribal Clinic, provides coding and pricing for all route slips, ensures patient records are maintained in a standardized format according to policy, processes, monitors, and submits

ambulatory patient care data to appropriate IHS agency. Ensures proper registration of all patients utilizing services at the clinic.

c. Billing - Maintains patient account information such as demographic and insurance coverage through patient registration, processes all service charges and reimbursements for care, tracks third party billings, provides management data for cash flow projections, utilizes and maintains a computer system for processing all billing components, maintains computer security, and provides periodic software upgrades.

d. Contract Health Services - A contract health services program is operated for all eligible individuals residing within the Menominee Tribal Clinic's service delivery area. This includes procurement of health services not available at the clinic. Clinic physicians make referrals to designated preferred health care providers. A CHS policy and procedure manual defines department operations.

e. Maintenance and Housekeeping - Maintenance and housekeeping is responsible for the repair, maintenance and cleaning of the entire health care facility.

2. Direct Medical Care

a. Medical Services - Direct patient care consists of physician and nursing services. Medical care services are directed by an Medical Director who directs patient care at the outpatient clinic. The ambulatory nursing component consists of state licensed registered nurses (RNS) and licensed practical nurses

(LPNs). Departmental operations are governed by the medical department's policy and procedures manual.

b. Laboratory Services - Two medical technologists and a laboratory aide provide laboratory services under the direct supervision of staff physicians The laboratory performs a variety of diagnostic tests, including routine chemistry, urinalysis, hematology, bacteriology, coagulation, endocrinology, and immunology. Outside reference laboratories are utilized for specialized testing. An approved laboratory policy and procedures manual plan governs the laboratory operation.

c. Radiology Services - An x-ray technologist provides routine diagnostic x-rays of the musculoskeleton as ordered by staff physicians. Established protocols are defined in the radiology department's policy and procedures manual.

d. Pharmacy - The pharmacy department is staffed by three pharmacists and two pharmacy technicians. The pharmacy services promotes the rational use of pharmaceutical products within community health and patient care management plans; the correct dispensing, use and administration of pharmaceutical products by patients; clinical staff consultation and monitoring and off site pharmacy services monitoring. The pharmacy is responsible for obtaining pharmaceutical drugs from appropriate sources according to standard procedures. Dispensing, counseling and related services shall be provided on

receipt of authorized prescriptions form approved health center and subcontract medical (off site) and dental providers. Department operations are defined in a pharmacy policy and procedures manual.

e. Women's Personal Health - The Women's Personal Health Program is staffed by a registered nurse and an outreach worker. Services offered include pregnancy testing, reproductive health, birth control counseling, follow up on sexually transmitted disease and abnormal pap smears, prenatal education, childbirth preparation classes, and post partum/postnatal services to women of all ages. The WPH program is a direct services program under this contract with funding support from contract income. Program direction and supervision is provided by the health administrator and designated staff.

f. Emergency Medical Services - the emergency medical services department provides twenty four hour emergency medical services to the reservation/county. It is staffed by state licensed emergency medical technicians. Levels of care are provided at the EMT Basic, EMT defibrillation and EMT advanced airway levels. An EMS policies and procedures manual governs the operation. The EMS program is a direct services program under this contract with funding support from contract income. Program direction and supervision is provided by the health director and designated staff.

3. Dental

   a. Dental - The dental department is staffed by three dentists, a dental hygienist, five dental assistants and a dental receptionist. Program services encompass the-total practice of general dentistry. Dental hygiene services including education and preventative planning activities are provided by a full time dental hygienist. The dental policy and procedures manual defines the scope of services.

4. Community Health

   a. Environmental Health - An environmental health specialist (sanitarian) is employed to plan, organize, and direct a comprehensive program to identify and address environmental conditions which may effect the health of the Menominee Indian Reservation residents. These areas include, community injury control, water quality, waste management, food, celebrations, institutional environmental health, vector control, recreational sanitation, epidemiological investigations, emergency situations, promotion of tribal codes and ordinances, industrial hygiene, operation and maintenance activities; general administrative activities, annual environmental planning, construction, radon testing and mitigation.

   b. Community Health Nursing Services - Community Health Nursing provides services in coordination with the staff physicians. The community health nurse incorporates into practice knowledge of clinical

nursing, community and social organization, ecology, biological, psychological, and social sciences. The primary focus of community health nursing is the prevention of illness, the promotion and maintenance of health and the provision of needed therapeutic services. A policy and procedures manual defines department operations.

c. Human Resource Center - The HRC department is responsible for providing outpatient mental health services. Individual, family and group therapy is available for family difficulties, marital problems, separation and divorce, parent-child difficulties, depression, anxiety, suicidal thoughts or actions, and school behavior problems. The department is staffed by two masters level psychologists and two masters level clinical social workers. A departmental policy and procedures manual governs program operations.

d. Optical - The optical department is staffed by two contracted optometrists, licensed by the Wisconsin State Optometry Board of Examiners. The following services are provided: eye examinations, eye glasses and contact lens. A departmental policy and procedures manual defines program operations.

e. Nutrition - A registered dietician provides nutrition education and counseling services for the Menominee community.

f. Audiology - An audiologist consultant is contracted to provide a full range of audiology screening, testing and referral services for the Menominee community.

g. Healthy Heart - The healthy heart program is directed by a registered nurse and a health fitness instructor. The program is aimed at reducing the high prevalence of cardiovascular disease for the Menominee people. Prevention activities will be continued and new wellness programs will be developed to reduce the risk of cardiovascular disease of people of all ages (children, youth, and adults) that take place in multiple settings (schools, work sites, and community).

Section 6 Other Provisions to which Parties Agree

1. Reporting Requirements

a. For each fiscal year which the Contractor receives or expends funds pursuant to P.L. 98-638, the Contractor shall submit to the Secretary a single agency audit report required by Chapter 75 of Title 31, United States Code.

b. The Contractor shall make an annual report to the Indian people in fulfillment of the Sec. 5© of P.L. 93-638 requirement for reports and information to Indian people. This annual report will include the PFSAs provided and the costs incurred. A copy of this report will also be provided to IHS.

c. Resource Patient Management System (RPMS)(Automated)

(1) Patient Registration

(2) Patient Care Component (medical)

(3) Patient Care Component(dental)

(4) Patient Care Component(Pharmacy)

(5) Contract Health Services (2.0)

(6) Immunization Report

(7) Community Health Activity Report (PHN)

d. Mental Health Report/Social Service System. Submit Quarterly to Area Mental Health Coordinator (Note: RPMS) system being implemented (MH/PCC)

e. Environmental Health Reporting System (Manual). Submit to Area Chief Environmental Health Services Branch.

2. IHS Headquarters PFSA/Tribal Shares

a. The initial FY '97 AFA does not include IHS Headquarter's PFSA/Tribal Shares funding with the agreement that PFSA and related funds will be incorporated by amendment as the negotiations are completed and funding is made available to the Area Office.

b. The IHS Headquarters PFSA/Tribal Shares calculation shall be provided to the Menominee Tribe for consideration. It is understood that the IHS may not be able to contract the total calculated PFSA/Tribal Shares during FY '97. It is anticipated that negotiations and decisions regarding available PFSA/Tribal Shares will be completed

within 90 days of the initial AFA effective date.

3. Bemidji Area PFSA/Tribal Shares

   a. The initial FY '97 AFA does not include Bemidji Area PFSA/Tribal Shares funding with the agreement that PFSA and related funds will be incorporated by modification as these negotiations are completed.

   b. Subject to negotiations and Tribal concurrence, the Bemidji. Area PFSA Tribal Shares for FY '97 are based on the Bemidji Area Title I PFSA/Tribal Shares calculations: It is understood that the Bemidji Area will not be able to contract the total calculated PFSA/Tribal Shares during FY '97. Area Office shares funding is proposed at 60% of calculated shares.

   c. Subject to negotiations, the Bemidji Area proposes to retain 40% of the calculated PFSA/Tribal Shares amount of the Bemidji Area Office and shall continue to provide the same level of service and support available to all Tribal operated programs under Title I.

   d. The calculated (Wisconsin Field Office) PFSA/Tribal Shares of $37,064 is included in the GLITC Health Services Annual Funding Agreement for the period ending 9/30/97.

   e. Other Retained PFSA/Tribal Shares

      (1) Bio-med services calculated at $8,700 is retained for services provided by

Area bio-med technician and Area bio-med equipment related support.

4. The term of this Annual Funding Agreement shall be for the period January 1, 1997 thru December 31, 1997.

5. TORT Claims Coverage

   a. For purposes of Federal Tort Claims Act Coverage, the contractor and its employees (including individuals performing personal services contracts with the contractor to provide health care services) are deemed to employees of the Federal government while performing work under this contract. This status is not changed by the source of the funds used by the contractor to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the contractor.

   b. Under this contract, the contractor's employee may be required as a condition of employment to provide health services to non-IHS beneficiaries in order to meet contractual obligations. These services may be provided in either contractor or non-contractor facilities. The employee's status for Federal Tort Claims Act purpose is not affected.

6. Program Income, Including Medicare/Medicaid

All Medicare, Medicaid or other program income received by the Tribe shall be treated as additional supplemental funding to that negotiated in the Annual Funding Agreement and the Tribe may retain

all such income, pursuant to section 106 (m) of the Act. Medicare/Medicaid collections of the Tribe under Title IV of Public Law 94-437, as amended, shall be used by the Tribe in accordance with any applicable statutory restrictions on the use of such funds. The Tribe is obligated to seek third party reimbursement as provided by federal law.

7. Eligibility for Services

In determining eligibility for services the Tribe shall comply with applicable eligibility provisions set forth in the Indian Health Care Improvement Act, as amended, other statutory law and applicable regulations.

Dated this 17th day of January, 1997
Menominee Indian Tribe of Wisconsin

By /s/ Betty Jo Woziak
Designated Official

United States of America, Department of Health and Human Services, Indian Health Service

By /s/ D. Murphy
Contracting Officer
Bemidji Area Office, Indian Health Service

AFA MODIFICATION No. 14 to IHS
CONTRACT No. 239-96-0030
EFFECTIVE: 1 11196-12131197

ANNUAL FUNDING AGREEMENT
MODIFICATION

Req. No.: 97-50-1176

09/09/97

Agreement No. 239-96-0030

Modification No. 97-14

Effective: January 1, 1996 - December 31, 1997

Issued By:

Indian Health Service
Bemidji Area Office
Room 211, Federal Building
Bemidji, MN 56601-3060

Contractor:

Menominee Indian Tribe of Wisconsin
PO Box 910
Keshena, WI 54135-0910

Authority: 25 USC 450(g), P.L 93-638, as Amended

A. Annual Funding Agreement No. 239-96-0030 is hereby modified to add the FY '97 non-recurring H/C Director's Health Emergency funds in the amount of $16,660, and non-recurring FY '97 Indirect Cost Shortfall funds in the amount of $861.

Total increase to contract of $17,461.

In order to accomplish this action, the following contractual change is made:

1. Section 3, Funds to be Provided, of the FY '97 Annual Funding Agreement is revised as follows:
Section 3 - Funds to be Provided

The funding amounts available to the Contractor for the period of this annual funding agreement shall be as follows:

H/C Area	7570390	J461161	7-39148.61	55.75	41.8B	98,168	
H/C	7570390	J461151	7-39148.61	55.75	41.8B	2,043,760	(+16,880)
DIR/CSC	7570390	J461179	7-39648.61	55.75	41.8A	182,190	
IDC/CSC	7570390	J461170	7-39648.61	55.75	41.8E	328,061	(+ 661)
MH	7570390	J461169	7-39148.63	55.75	41.8B	6,160	
CHS	757/90390	J462K75	7-57048.68	55.75	41.8B	1,822,560	
DEN	7570390	J461164	7-39148.62	55.75	41.8B	48,300	
PHN	7570390	J461171	7-39248.72	55.75	41.8B	10,360	
M&J	7500391	J461167	7-39648.76	55.75	41.8B	77,280	
OEH Eq.	7500391	J461172	7-39648.71	55.75	41.8B	48,933	
IPP	7500391	J461168	7-39248.77	55.75	41.8B	4,706	
CHEF	7500390	J460175	7-41148.61	55.75	41.8B	35,675	
HE	7570390	J461162	7-39248.73	55.75	41.8B	530	
Dir Ops	7570390	J461173	7-39648.60	55.75	41.8B	1,780	
ALC	7570390	J461156	7-39148.64	55.75	41.8B	2,960	
					Sub-total	3,982,293	(+17,521)

FR - Certification of Funds
Concur: rhs Sept 8, 1997
Budget: man97m14

FY'97 Headquarters Shares

H/C	7,570,390	J461151	7-39148.61	55.75	41.8B	40,735
DEN	7,570,390	J461164	7-39148.62	55.75	41.8B	2,875
MH	7,570,390	J461169	7-39148.63	55.75	41.8B	3,037
ALC 437	7,570,390	J461159	7-39148.64	55.75	41.8B	10,218
PHN	7,570,390	J461171	7-39248.72	55.75	41.8B	2,478
Hlth Ed	7,570,390	J461162	7-39248.73	55.75	41.8B	3,061
CHR	7,570,390	J461174	7-39248.74	55.75	41.8B	6,537
Dir.Ops.	7,570,390	J461173	7-39648.60	55.75	41.8B	18,653
CHS/Res	757/90390	J462K75	7-57048.68	55.75	41.8B	4,028
					HQ'97	91,742
					SUBTOTAL FY 97	$3,963,945

FY'98 Headquarters Shares (October 1 to December 31, 1997)

H/C	7,580,390	J461151	8-39148.61	55.75	41.8B	13,579
DEN	7,580,390	J461164	8-39148.62	55.75	41.8B	991
MH	7,580,390	J461169	8-39148.63	55.75	41.8B	1,012
ALC 437	7,580,390	J461159	8-39148.64	55.75	41.8B	3,406
PHN	7,580,390	J461171	8-39248.72	55.75	41.8B	826
Hlth Ed	7,580,390	J461162	8-39248.73	55.75	41.8B	1,027
CHR	7,580,390	J461174	8-39248.74	55.75	41.8B	2,180
Dir.Ops.	7,580,390	J460073	8-39648.60	55.75	41.8B	6,218
CHS/Res	758/90390	J462Q75	8-59048.68	55.75	41.8B	1,342
					HQ'98	30,580
					TOTAL AFA Est. Funding	$3,994,525

Note: the FY'98 HQ Shares are subject to the availability of funds, will be disbursed upon the '98 Congressional allowance

B. AFA No. 239-96-0030 is hereby increased by $17,521 from $3,967,004 to $3,984,525 as a result of this modification.

C. The funding period remains unchanged ending December 31, 1997.

D. There are no other changes as a result of this modification.

E. a. Dennis Murphy
Contracting Officer

b. /s/ Dennis Murphy 9/9/97
Contracting Officer Signature Date

EXHIBIT D

MENOMINEE TRIBE'S 1998 AFA
1/1/98-12/31/98
ATTACHMENT 2-98 TO
IHS CONTRACT No. 239-96-0030

ATTACHMENT 2-98
TO INDIAN SELF-DETERMINATION
AGREEMENT
IHS CONTRACT NUMBER 239-96-0030
ANNUAL FUNDING AGREEMENT
BETWEEN THE SECRETARY OF HEALTH AND
HUMAN SERVICES AND
THE MENOMINEE INDIAN TRIBE OF WISCONSIN

BEMIDJI AREA OFFICE
[LOGO]
IHS

JANUARY 1, 1998 - DECEMBER 31, 1998

ANNUAL FUNDING AGREEMENT
BETWEEN THE MENOMINEE INDIAN TRIBE OF
WISCONSIN AND THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES
JANUARY 1, 1998 - DECEMBER 31, 1998

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5. BRIEF DESCRIPTION OF PFSA'S TO BE PROVIDED
6. OTHER PROVISIONS TO WHICH PARTIES AGREEE

ATTACHMENT A - TRIBAL BUDGET

Section 1 Purpose

This Annual Funding Agreement is entered into by the Menominee Indian Tribe of Wisconsin (referred to in this agreement as Contractor) and the U.S. Department of Health and Human Services, Indian Health Service (referred to in this agreement as IHS) in accordance with Sec. 108 (25 USC 4501) © Section 1, (f), (2) and pursuant to the Self-Determination Model Agreement No. 239-96-0030, dated January 1, 1996, under the provisions of Title I of P.L. 93-638, as amended.

Section 2 List of Programs, Functions, Services, and Activities to be Performed

The Menominee Indian Tribe, hereinafter referred to as Contractor shall continue to administer and operate the Menominee Tribal Health Services Program on the Menominee Indian Reservation utilizing

the tribal health facility at Keshena, Wisconsin. The Menominee Health Center is fully accredited by the Joint Commission of Accreditation of Hospital Organizations (JCAHO). The purpose of this comprehensive health service program is to provide high quality ambulatory medical, dental, community health services, and the administration thereof for eligible individuals residing within the target area. The Contractor may also provide services to non-beneficiaries on a fee-for-service basis as authorized by IHS Manual 2-43 I (emergency cases) and IHS Manual 2-3.3 J. (non-emergency cases).1.

The Contractor agrees to provide the programs, functions, services, and activities (PFSA) as consolidated under the general budget categories listed below and in accordance with the Program Standards listed in the Model Agreement:

A. Administrative Services
    1. Administration
    2. Medical Records
    3. Billing
    4. CHS
    5. Housekeeping/Maintenance

B. Ambulatory Services:
    1. Medical Services, including:
        a. Physicians
        b. Nurse Practitioner (NP)
        c. Physician Assistant
        d. Pharmacy Services
        e. Laboratory Services

f. Ambulatory Care - Nursing

g. Medical and Technical Relief Coverage including: Medical Director, Radiology Technicians, Dentists, Hospital Coverage-Physician, Nutritionist, Psychotherapists.

2. Dental Services (Direct and Contract Health)

3. Audiology

4. Clinic/Program Administration

5. Contract Health Services (CHS), including Inpatient, Outpatient, and Optical.

6. Patient Transportation Services

7. Emergency Medical Services

C. Preventive Health Services:

1. Dental Prevention Services

2. Environmental Health and Sanitarian Services

3. Public Health Nursing Services (CHNS)

4 Nutrition Services

5. Mental Health

6. Wellness Program

7. Health Promotion Disease Prevention

8. Aids Prevention and Aids Health Education

9. Maternal Child Health/CHR

10. Family Planning Services

Section 3 Funds to be Provided

The funding amounts available to the Contractor for the period of this annual funding agreement shall be as follows:

1/1/98 - 12/31/98						Estimated '98 Amount
H/C	7580390	J461151	8-39146.61	41.8B	55.75	$2,051,049
DIR/CSC	7580390	J461170	8-39846.61	41.8A	55.75	152,100
IDC/CSC	7580390	J461170	8-39846.61	41.8E	55.75	319,200
MH	7580390	J461169	8-39146.63	41.8B	55.75	6,100
CHS	75-8/9-0390	J46ZQ75	8-39146.66	41.8B	55.75	1,013,250
DEN	7580390	J461164	8-57046.66	41.8B	55.75	48,300
PHN	7580390	J461171	8-39246.72	41.8B	55.75	8,000
HE	7580390	J461162	8-39246.73	41.8B	55.75	180
DIR OPS	7580390	J461173	8-39646.80	41.8B	55.75	1,700
OEH Equip	75X0391	J461172	8-29646.61	41.8B	55.75	51,344
				Total		3,780,694

Note: (1) BAO will withhold $248,900 of H/C funds for C.O. detail of MD, Culhane $118,050; and, MD, Exner $130,850; for the period 10/1/97 thru 9/30/98. Amount includes $80,000 for special pay, subject to adjustment after actual special pay is determined. $600 will be charged for the IPA/MOAs.

BAO will also withhold $8,480 for BIO-Med services.

(2) The CSC IDC historical amount is $319,200 and is considered non-recurring and must be used for indirect costs only.

FY'98 Area Tribal Shares @100%

H/C	7580390	J461151	8-39146.61	55.75	41.8B	54,782
DEN	7580390	J461164	8-39146.62	55.75	41.8B	14,782
MH	7580390	J461169	8-39146.63	55.75	41.8B	34,782
HE	7580390	J461162	8-39246.73	55.75	41.8B	34,781
					Total	$139,127

FY'98 Headquarters Tribal Shares @75% for the period 1/1/98 to 9/30/98

H/C	7580390	J461151	8-39146.61	55.75	41.8B	54,246
DEN	7580390	J461164	8-39146.62	55.75	41.8B	3,337
MH	7580390	J461169	8-39146.63	55.75	41.8B	4,506
PHN	7580390	J461171	8-39246.72	55.75	41.8B	2,478
HE	7580390	J461162	8-39246.73	55.75	41.8B	3,081
CHR	7580390	J461174	8-39246.74	55.75	41.8B	6,538
DIR OPS	7580390	J461173	8-39646.80	55.75	41.8B	32,441
CHS/Res	758/90390	J46ZQ75	8-58046.66	55.75	41.8B	4,028
					Total	110,655

FY'99 H.Q. Tribal Shares @25% for the period 10/1/98 to 12/31/98

H/C	7590390	J461151	9-39146.61	55.75	41.8B	18,082
DEN	7590390	J461164	9-39146.62	55.75	41.8B	1,112
MH	7590390	J461169	9-39146.63	55.75	41.8B	1,502
PHN	7590390	J461171	9-39246.72	55.75	41.8B	826
HE	7590390	J461162	9-39246.73	55.75	41.8B	1,027
CHR	7590390	J461174	9-39246.74	55.75	41.8B	2,180
DIR OPS	7590390	J461173	9-39646.80	55.75	41.8B	10,814
CHS/Res	759/00390	J46Z 75	9-58046.66	55.75	41.8B	1,343
					Total	36,886

Total Contract $4,067,362

Headquarters Tribal Shares are pro-rated for calendar year tribes @ 75/25. The FY '99 HQ shares are subject to the availability of funds and will be disbursed based upon the FY '99 congressional appropriations.

Section 4 Time and Method of Payment

The time and method of payment of funds to the Contractor for the operation and administration of the programs, functions, services, and activities identified under this agreement shall be as follows:

1. As requested by the Tribe and authorized by section (a)(6)(B) or me Model Agreement, for all programs of a recurring nature for which amounts have been determined prior to the beginning of the Annual Funding Agreement (AFA) Year the Secretary shall provide a single lump sum payment as of the first day of the AFA year or as soon thereafter as practicable or possible.
2. In the event of a "Continuing Resolution", the Secretary will provide the maximum funding allowed.

Section 5 Brief Description of PFSA's to be Provided

Programs, Functions, Services and Activities. The Contractor shall operate the following programs:

1. Administrative Services
    a. Administration - The Menominee Indian Tribe and its delegate Health Committee is responsible for overall operation of the tribal comprehensive health program, which is under the administrative supervision of the Tribal Health Administrator and medical direction by the Medical Director. Responsibilities include planning and developing organization objectives, designing operational plans and establishing policy, allocating resources, organizing work processes, staffing, retaining human resources, directing, controlling, and monitoring organizational activities.
    b. Medical Records - Maintains all outpatient health care records in POMR format, transcribes progress notes, handles record

transfers to and from the Menominee Tribal Clinic, provides coding and pricing for all route slips, ensures patient records are maintained in a standardized format according to policy, processes, monitors, and submits ambulatory patient care data to appropriate IHS agency. Ensures proper registration of all patients utilizing services at the clinic.

c. Billing - Maintains patient account information such as demographic and insurance coverage through patient registration, processes all service charges and reimbursements for care, tracks third party billings, provides management data for cash flow projections, utilizes and maintains a computer system for processing all billing components, maintains computer security, and provides periodic software upgrades.

d. Contract Health Services - A contract health services program is operated for all eligible individuals residing within the Menominee Tribal Clinic's service delivery area This includes procurement of health services not available at the clinic. Clinic physicians make referrals to designated preferred health care providers. A CHS policy and procedure manual defines department operations.

e. Maintenance and Housekeeping - Maintenance and housekeeping is responsible for the repair, maintenance and cleaning of the entire health care facility.

2. Direct Medical Care

a. Medical Services - Direct patient care consists of physician, mid-level practitioner including

physician assistant, nurse practitioner, and nursing services. Medical care services are directed by an Medical Director who directs patient care at the outpatient clinic. The ambulatory nursing component consists of state licensed registered nurses (RNS) and licensed practical nurses (LPNs). Departmental operations are governed by the medical department's policy and procedures manual.

b. Laboratory Services - Two medical technologists and a laboratory aide provide laboratory services under the direct supervision of staff physicians. The laboratory performs a variety of diagnostic tests, including routine chemistry, urinalysis, hematology, bacteriology, coagulation, endocrinology, and immunology. Outside reference laboratories are utilized for specialized testing. An approved laboratory policy and procedures manual plan governs the laboratory operation.

c. Radiology Services - An x-ray technologist provides routine diagnostic x-rays of the musculoskeleton as ordered by staff physicians. Established protocols are defined in the radiology department's policy and procedures manual.

d. Pharmacy - The pharmacy department is staffed by three pharmacists and two pharmacy technicians. The pharmacy services promotes the rational use of pharmaceutical products within community health and patient care management plans; the correct dispensing, use and administration of pharmaceutical products by patients; clinical staff

consultation and monitoring and off site pharmacy services monitoring. The pharmacy is responsible for obtaining pharmaceutical drugs from appropriate sources according to standard procedures. Dispensing, counseling and related services shall be provided on receipt of authorized prescriptions form approved health center and subcontract medical (off site) and dental providers. Department operations are defined in a pharmacy policy and procedures manual.

e. Women's Personal Health - The Women's Personal Health Program is staffed by a registered nurse and an outreach worker. Services offered include pregnancy testing, reproductive health, birth control counseling, follow up on sexually transmitted disease and abnormal pap smears, prenatal education, childbirth preparation classes, and post partum/postnatal services to women of all ages. The WPH program is a direct services program under this contract with funding support from contract income. Program direction and supervision is provided by the health administrator and designated staff.

f. Emergency Medical Services - the emergency medical services department provides twenty four hour emergency medical services to the reservation/county. It is staffed by state licensed emergency medical technicians. Levels of care are provided at the EMT Basic, EMT defibrillation and EMT advanced airway levels. An EMS policies and procedures manual governs the operation. The EMS program is a direct services program under

this contract with funding support from contract income. Program direction and supervision is provided by the health director and designated staff.

3. Dental

   a. Dental - The dental department is staffed by three dentists, a dental hygienist, five dental assistants and a dental receptionist. Program services encompass the-total practice of general dentistry. Dental hygiene services including education and preventative planning activities are provided by a full time dental hygienist. The dental policy and procedures manual defines the scope of services.

4. Community Health

   a. Environmental Health - An environmental health specialist (sanitarian) is employed to plan, organize, and direct a comprehensive program to identify and address environmental conditions which may effect the health of the Menominee Indian Reservation residents. These areas include, community injury control, water quality, waste management, food, celebrations, institutional environmental health, vector control, recreational sanitation, epidemiological investigations, emergency situations, promotion of tribal codes and ordinances, industrial hygiene, operation and maintenance activities; general administrative activities, annual environmental planning, construction, radon testing and mitigation.

b. Community Health Nursing Services - Community Health Nursing provides services in coordination with the staff physicians. The community health nurse incorporates into practice knowledge of clinical nursing, community and social organization, ecology, biological, psychological, and social sciences. The primary focus of community health nursing is the prevention of illness, the promotion and maintenance of health and the provision of needed therapeutic services. A policy and procedures manual defines department operations.

c. Mental Health - The Mental Health department is responsible for providing outpatient mental health services. Individual, family and group therapy is available for family difficulties, marital problems, separation and divorce, parent-child difficulties, depression, anxiety, suicidal thoughts or actions, and school behavior problems. The department is staffed by two masters level psychologists and two masters level clinical social workers. A departmental policy and procedures manual governs program operations.

d. Optical - The optical department is staffed by two contracted optometrists, licensed by the Wisconsin State Optometry Board of Examiners. The following services are provided: eye examinations, eye glasses and contact lens. A departmental policy and procedures manual defines program operations.

e. Nutrition - A registered dietician provides nutrition education and counseling services for the Menominee community.

f. Audiology - An audiologist consultant is contracted to provide a full range of audiology screening, testing and referral services for the Menominee community.

g. Wellness Program - The Wellness program is directed by a registered nurse and a health fitness instructor. The program is aimed at reducing the high prevalence of cardiovascular disease for the Menominee people. Prevention activities will be continued and new wellness programs will be developed to reduce the risk of cardiovascular disease of people of all ages (children, youth, and adults) that take place in multiple settings (schools, work sites, and community).

Section 6 Other Provisions to which Parties Agree

1. Reporting Requirements

a. For each fiscal year which the Contractor receives or expends funds pursuant to P.L. 98-638, the Contractor shall submit to the Secretary a single agency audit report required by Chapter 75 of Title 31, United States Code.

b. The Contractor shall make an annual report to the Indian people in fulfillment of the Sec. 5© of P.L. 93-638 requirement for reports and information to Indian people. This annual report will include the PFSAs provided and the costs incurred. A copy of this report will also be provided to IHS.

c. Resource Patient Management System (RPMS)(Automated)

(1) Patient Registration

(2) Patient Care Component(dental)

(3) Patient Care Component(Pharmacy)

(4) Contract Health Services (2.0)

(5) Immunization Report

(6) Community Health Activity Report (PHN)

d. Environmental Health Reporting System (Manual). Submit to Area Chief Environmental Health Services Branch.

2. IHS Headquarters PFSA/Tribal Shares

a. For FY '98, IHS Headquarters PFSA/Tribal Shares are available to the Menominee Indian Tribe at %100 of unemcumbered programs, functions, services and activities in the amount of $213,316. Headquarters Tribal Shares are pro-rated for calendar year tribes @ 75/25. The FY '99 HQ shares are subject to the availability of funds and will be disbursed based upon the FY '99 congressional appropriations.

PFSA/Tribal retained by IHS Headquarters for the benefit of the Menominee Indian Tribe are as follows:

Total Available	$213,316 less retained
IRM Support Fund	- 34,394
IRM Staff & Operations - HQW	- 22,896
Dir Ops (16.4%)	- 8,484
Total	$147,541

3. Bemidji Area PFSA/Tribal Shares

   a. For FY '98 the Bemidji Area PFSA/Tribal Shares are available to the Menominee Indian Tribe at %100 of unemcumbered program, functions, services and activities in the amount of $204,280.

      PFSA/Tribal Shares retained by the Bemidji Area Office for the benefit of the Menominee Indian Tribe are as follows:

Total Available	$ 204,280 less retained
MIS	-22,498
Health Info. Mgmt.	- 5,591
GLITC	-37,064
Total	$ 139,127

   b. The calculated (Wisconsin Field Office) PFSA/Tribal Shares of $37,064 is included in the GLITC Health Services Annual Funding Agreement for the period ending 9/30/98.

   c. Other Retained PFSA/Tribal Share

      (1) Bio-med services calculated at $8,480 is retained for services provided by Area bio-med technician and Area bio-med equipment related support.

4. The term of this Annual Funding Agreement shall be for the period January 1, 1998 thru December 31, 1998.

5. TORT Claims Coverage

   a. For purposes of Federal Tort Claims Act Coverage, the contractor and its employees (including individuals performing personal services contracts with the contractor to

provide health care services) are deemed to employees of the Federal government while performing work under this contract. This status is not changed by the source of the funds used by the contractor to pay the employee's salary and benefits unless the employee receives additional compensation for performing covered services from anyone other than the contractor.

b. Under this contract, the contractor's employee may be required as a condition of employment to provide health services to non-IHS beneficiaries in order to meet contractual obligations. These services may be provided in either contractor or non-contractor facilities. The employee's status for Federal Tort Claims Act purpose is not affected.

6. Program Income, Including Medicare/Medicaid

All Medicare, Medicaid or other program income received by the Tribe shall be treated as additional supplemental funding to that negotiated in the Annual Funding Agreement and the Tribe may retain all such income, pursuant to section 106 (m) of the Act. Medicare/Medicaid collections of the Tribe under Title IV of Public Law 94-437, as amended, shall be used by the Tribe in accordance with any applicable statutory restrictions on the use of such funds. The Tribe is obligated to seek third party reimbursement as provided by federal law.

7. Eligibility for Services

In determining eligibility for services the Tribe shall comply with applicable eligibility provisions set forth in the Indian Health Care Improvement Act, as

amended, other statutory law and applicable regulations.

Dated this 17th day of January, 1997
Menominee Indian Tribe of Wisconsin

By /s/ Betty Jo Woziak
Designated Official

United States of America, Department of Health and Human Services, Indian Health Service

By /s/ D. Murphy
Contracting Officer
Bemidji Area Office, Indian Health Service

MODIFICATION No. 98-21 to MENOMINEE'S
1998 AFA
CONTRACT No. 239-96-0030

EFFECTIVE 9/23/98

MODEL/ANNUAL FUNDING AGREEMENT
MODIFICATION

Agreement No. 239-96-0030

Modification No. 98-21

Effective: 09/23/98

Requisition: 98-50-1169

Issued By:

Indian Health Service
Bemidji Area Office
211 Federal Building
Bemidji, Minnesota 56601

Contractor Name and Address:

Menominee Indian Tribe of Wisconsin
PO Box 910
Keshena, Wisconsin 54135

Payment Made by:

Indian Health Service
Aberdeen Area Finance
115 Fourth Avenue
Aberdeen, S. Dak. 57401

A. AFA No. 239-96-0030 is hereby modified to increase the funding amount by $8,653 which reflects reobligation of $6,637 of H/C funds to reduce the total C.O. withholding to reflect actual cost of $242,263, to add $$618 of FY '97 CSC IDC

shortfall, $900 of FY '97 OEH CSC IDC, and $498 of FY '98 CSC IDC shortfall.

In order to accomplish this action, the following contractual changes are made:

1. Section 3. Funds to be Provided, of the '98 AFA is hereby revised as follows:

   a. The funding amounts available to the Contractor for the period of this annual funding agreement shall be as follows:

1/1/98 - 12/31/98						Estimated '98 Amount	
H/C	7580360	J481161	8-39148.61	41.88	55.75	2,212,347	(+6,657)
CSC/DIR	7580360	J481170	8-39048.61	41.8A	55.75	152,100	
CSC/IDC	7580360	J481170	8-39048.61	41.8E	55.75	319,698	(+498) NR
CSC/IDC	7670369	J481170	7-39048.61	41.8E	55.75	618	(+918) NR
CHS	758/60360	J4620276	8-58048.68	41.88	55.75	1,022,240	
PHN	7580360	J481171	8-39248.72	41.88	55.75	9,090	
HE	7580360	J481162	8-39248.73	41.88	55.75	570	
MH	7580360	J481169	8-39148.63	41.88	55.75	7,650	
DEN	7580360	J481164	8-39148.62	41.88	55.75	51,060	
CHR	7580360	J481174	8-39248.74	41.88	55.75	10	
DIR OPS	7580360	J481173	8-39048.60	41.88	55.75	560	
OEH Equipment	75X0391	J481172	8-29848.71	41.88	55.75	81,344	
M&I	75X0391	J481167	8-29048.78	41.88	55.75	94,970	
M&I Project	75X0391	J481167	7-29048.28	41.88	55.75	13,000	
IPP	75X0391	J481168	8-29248.77	41.88	55.75	1,000	
ALC	7580360	J481166	8-39148.64	41.88	55.75	4,900	
OEH CSC IDC	75X0391	J462001	7-29448.71	41.8E	55.75	800	(+800) NR
				Total FY'98 Est.		3,942,087	(+8,653)

Note: BAO will withhold $242,263 of H/C funds to C.O. detail of MD Culhane ($115,344); and ($126,919) for MD Exner, for the period 10/1/97 thru 9/30/98. Amount includes $80,000 for special pay. BAO will also withhold $8,480 for Bio-Med Services. $600 is assessed for IPA/MOA administration.

Name of Contracting Officer:

Dennis Murphy, Contracting Officer

Contracting Officer Signature and Date:

/s/ Dennis Murphy 09/23/98

MODEL/ANNUAL FUNDING AGREEMENT MODIFICATION

Agreement No. 239-96-0030

Modification No. 98-21

Requisition: 98-50-1169

FY98 Area Tribal Shares @100%

HVC	7580360	J461151	8-39146.61	55.75	41.88	54,782
DEN	7580360	J461164	8-39146.62	55.75	41.88	14,782
MH	7580360	J461169	8-39146.63	55.75	41.88	34,782
HE	7580360	J461152	8-39246.73	55.75	41.88	34,781
					Total	139,127

FY98 Headquarters Tribal Shares @ 75% for the period 1/1/98 to 9/30/98

HVC	7580360	J461151	8-39146.61	55.75	41.88	54,246
DEN	7580360	J461164	8-39146.62	55.75	41.88	3,337
MH	7580360	J461169	8-39146.63	55.75	41.88	4,506
PHN	7580360	J461171	8-39246.72	55.75	41.88	2,478
HE	7580360	J461152	8-39246.73	55.75	41.88	3,061
CHR	7580360	J461174	8-39246.74	55.75	41.88	8,538
Dir Ops	7580360	J461173	8-39646.60	55.75	41.88	32,441
CHS/Res	758/90360	J46ZQ75	8-69046.66	55.75	41.88	4,028
					Total	110,655

FY98 Headquarters Tribal Shares @ 25% for the period 10/1/98 to 12/31/98

HVC	7590360	J461151	9-39146.61	55.75	41.88	18,082
DEN	7590360	J461164	9-39146.62	55.75	41.88	1,112
MH	7590360	J461169	9-39146.63	55.75	41.88	1,502
PHN	7590360	J461171	9-39246.72	55.75	41.88	826
HE	7590360	J461152	9-39246.73	55.75	41.88	1,027
CHR	7590360	J461174	9-39246.74	55.75	41.88	2,180
Dir Ops	7590360	J461173	9-39646.60	55.75	41.88	10,814
CHS/Res	759/00360	J46ZD75	9-69046.66	55.75	41.88	1,343
					Total	36,886

FY98 Aberdeen Area Tribal Shares

HVC	7580360	J461151	8-39146.61	55.75	41.88	25,193
					Total Contract	4,253,958 (+8,853)

MODEL/ANNUAL FUNDING AGREEMENT
MODIFICATION

Agreement No. 239-96-0030

Modification No. 98-21

Requisition: 98-50-1169

Headquarters Tribal Shares are pro-rated for calendar year tribes. 75/25

The FY '99 HQ Shares are subject to the availability of funds and will be disbursed based upon the FY '99 congressional appropriations.

B. The FY '98 AFA funding amount is hereby increased by $8,653 from $4,245,305 to $4,253,958 by reason of this modification.

C. The FY '98 AFA funding period remains unchanged as a result of this modification.

D. There are no other changes by reason of this modification

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case Number: 1:07cv00812

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

v.

UNITED STATES OF AMERICA, KATHLEEN SEBELIUS, Secretary of the Department of Health and Human Services, and YVETTE ROUBIDEAUX, Director of the Indian Health Service

Defendants.

Hon. Rosemary M. Collyer

Declaration of William F. Fisher

I, William F. Fisher, hereby declare as follows:

1. I am currently employed as the Chief Contracting Officer at the Bemidji Area Office (BAO or Area Office) of the Indian Health Service (IHS). I have been employed in this capacity since January 2008. Prior to serving in my present position, I was employed at the BAO as a Supervisory Construction Contract Specialist and as a Construction Contract Specialist.

2. As the Area's Chief Contracting Officer, I am responsible for supervising our Contract Specialists

who work with our Area Lead Negotiator in negotiating and awarding contracts under Title I of the Indian Self-Determination and Education Assistance Act (ISDA). The Contract Specialists under my supervision also prepare the Title I contracts, annual funding agreements (AFAs), modifications to the AFAs, releases, and other documents related to the administration of the contracts. My duties include reviewing and signing all Title I contracts, AFAs, modifications to the AFAs, and releases that tribes or tribal organizations (Tribal Contractors) choose to enter into with our agency.

3. The IHS has twelve Area Offices throughout the country and a headquarters office in Rockville, Maryland. Each of the twelve Area Offices has primary responsibility for negotiating, awarding, and administering all ISDA contracts with tribes located in its jurisdiction. Our Area Office has its headquarters in Bemidji, Minnesota, and its jurisdiction covers the states of Minnesota, Wisconsin, and Michigan. The BAO negotiated, awarded, and administered the ISDA contracts with the Menominee Indian Tribe of Wisconsin (Menominee) that are the subject of this lawsuit.

4. This declaration is based my own personal knowledge and on information that I have obtained in the course of my employment. Any records referenced are maintained in the ordinary course of business by IHS employees and are made by persons with firsthand knowledge of the information contained in those records.

5. Pursuant to Title I of the ISDA, Tribal Contractors contract with the IHS to provide services to eligible American Indians and Alaska Natives. Tribal Contractors are eligible to receive the same level of

funding the Secretary would otherwise provide to carry out the programs, services, functions, or activities (PSFAs) that they have proposed to operate. This funding is often called the "Secretarial amount" or "direct program funding." The regulations governing the award and administration of self-determination contracts can be found at 25 C.F.R. Part 900.

7. Around 2000, Congress expanded the ISDA by adding a new provision (Title V) which provided permanent authority for Tribal Contractors to "compact" for the same PSFAs and associated funding that Tribal Contractors could otherwise contract for. Under these compacts, called Self-Governance compacts, Tribal Contractors are provided even more autonomy to manage their PSFAs with very limited oversight from the IHS. The regulations governing Self-Governance Compacts can be found at 42 C.F.R. Part 137. This Title replaced Title III of the ISDA which had made Self-Governance compacting a demonstration project in the IHS.

8. Congress passes an annual appropriation for the IHS to fund both the health care services provided under self-determination contracts and compacts and the health care services provided directly by the IHS to Indians. The IHS is tasked with ensuring that the health care needs of Indians are met through both directly operated services and services rendered under self-determination contracts and compacts.

Contract Support Costs

9. In addition to the direct program funding (Secretarial amount), the ISDA allows the IHS to award to Tribal Contractors in their contracts what are called contract support costs (CSC). CSC are defined by the ISDA as "the reasonable costs for

activities which must be carried on by a Tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which (A) normally are not carried on [by the Secretary] in his [her] direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract." CSC funding, like program funding, is subject to the availability of appropriations.

10. CSC are further broken down into "direct" CSC and "indirect" CSC. Indirect CSC are contract support costs that benefit or support multiple programs but which are difficult or resource-intensive to allocate precisely among the shared programs. Direct CSC are contract support costs that are directly associated with a particular contracted-for program but are not included in the direct program award.

11. A Tribal Contractor may treat a given CSC as either a direct or indirect cost depending on how the Tribal Contractor is organized and how it chooses to administer its programs. For example, one Tribal organization may consider housekeeping and janitorial costs as indirect costs because they are a common or shared cost for administering several programs, while another Tribal contractor may consider those services to be appropriately charged as direct CSC to an inpatient facility program that benefits exclusively from those services. Similarly, one Tribal organization may charge all of the department head salaries as a shared cost of executive direction and thus consider it indirect, while another may appropriately charge each of those salaries directly to the programs administered by each department head.

12. The IHS awards CSC from its annual appropriation. In years prior to 1998, the IHS allocated CSC

for ongoing contracts based on amounts that were designated for that purpose in the annual congressional committee reports that accompanied the agency's appropriation. Since 1998, Congress has limited the total amount of ongoing CSC available directly in the appropriations bills, and the IHS has thus allocated this specific amount for CSC. Since at least 1993, Congress has also limited appropriations for CSC associated with the initial year of an assumption of a program, function, service or activity (PFSA) by a Tribal Contractor. These funds are sometimes referred to as the Indian Self-Determination Fund or ISD Fund.

13. Since at least 1995, the IHS's total allocations for CSC have been insufficient to fund the total amount requested by all Tribal Contractors for CSC in each year since at least 1993. Some, but not all, Tribal Contractors, however, receive CSC funding sufficient to fund their full CSC need.

14. Insufficient CSC appropriations have been a topic of discussion between the IHS and Tribal Contractors since before 1988. Both the IHS and Tribal Contractors have repeatedly testified before Congress to seek additional appropriations for CSC. Insufficient CSC appropriations have been a national issue since the 1980s, and Tribal Contractors have consistently communicated to the IHS that CSC funding is one of their top ten funding priorities. See Exhibit 1, Letter to Congressman Ralph Regula, dated March 8, 2000.

15. In 1992, the IHS initiated a joint IHS/Tribal workgroup to analyze CSC issues and to make recommendations to the IHS Director concerning CSC policy. At times, Tribal participation at meetings of this workgroup has exceeded 100 participants. This workgroup had been integral to the development of

IHS CSC policy. See Exhibit 2, Dear Tribal Leader letter dated October 8, 1999.

Policies of the Indian Health Service

16. Over the years, the IHS has had to develop policies for allocating the annual appropriation for CSC among contracting and compacting Tribal Contractors. These policies, developed with full Tribal participation, have been memorialized in a series of guidance memoranda or Circulars. IHS Memoranda and Circulars are not binding on Tribal Contractors unless they agree to follow them. The policies set forth the guidelines that IHS officials follow for ISDA contracting and compacting and the funding of CSC. Some Tribal Contractors, however, have negotiated terms for their ISDA contracts that were not specifically addressed in the IHS Circulars.

17. The relevant IHS Memoranda and Circulars are: Indian Self-Determination Memorandum 92-2, which was adopted in 1992 and remained in effect until April 1, 1996; IHS CSC Circular No. 96-04, which was adopted in 1996 and remained in effect until 2000; IHS CSC Circular No. 2000-01, which was adopted in January 2000 and was applicable to 2000 and 2001 ISDA awards. See Exhibits 3, 4 and 5.

18. Many Tribal Contractors use a government-wide indirect cost rate negotiated with a separate federal government agency, called the "cognizant agency", (e.g., the Department of the Interior's National Business Center (NBC) or HHS's Division of Cost Allocation (DCA)) under guidance published by the Office of Management and Budget. The indirect cost rate is simply a mechanism for determining fairly and conveniently what proportion of administrative

costs may be allocated to each of the programs administered by a tribe. An indirect cost rate represents the ratio of the total indirect costs incurred by the tribe to the benefitting direct program costs, after excluding unallowable costs and expenditures such as capital expenditures and pass-through funds.

19. The IHS does not directly play a part in the negotiation of an indirect cost rate and does not have the authority to adjust an indirect cost rate negotiated with a cognizant agency. The IHS, however, might adjust the amount of CSC calculated under an indirect cost rate to address duplication or other factors as authorized or mandated by the ISDA. If a Tribal Contractor believes that its indirect cost rate is too low or erroneous for whatever reason, it should not sign the indirect cost rate agreement and instead should raise its concerns to its cognizant agency.

20. The NBC was Menominee's cognizant agency for the negotiation of its indirect cost rate agreements for the years 1995 through 2000. Some tribes in our Area choose not to negotiate an indirect cost rate agreement with their cognizant agency. In those situations, the tribes negotiate with our office for a lump sum amount for "indirect type costs" that is awarded to Tribal Contractors that do not have formally negotiated rate agreements with their cognizant Federal agency for reimbursement under an IDC rate.

Memorializing Contract Negotiations in Contracts

21. Each year prior to the passage of IHS's appropriation, our Area Office conducts contract negotiations with Tribal Contractors that have ISDA contracts in our Area. The ISDA does not prescribe or specify a precise amount that the IHS must award for

CSC (direct or indirect). Rather, the amount of CSC to be awarded is the result of individual negotiations between the Tribal Contractors and our agency. Before the contract can be signed, the parties must agree to the amount of the CSC award.

22. The IHS can decline to enter a contract only if one of the criteria in 25 U.S.C. 450(f)(a)(2) is met. When IHS declines due to a disagreement over the funding levels, IHS may rely on the criteria that the tribe cannot properly complete or maintain the contract, if IHS believes the funding to be provided is sufficiently below the tribe's proposed budget so that the Tribe would be unable to properly maintain the contract with the funds to be provided. IHS may also decline based on the criteria that the tribe's proposed funding level exceeds the "applicable funding level," if IHS determines that the CSC proposal is excessive based on both the negotiation of the tribe's CSC need and the availability of appropriations. 25 U.S.C. 450(f)(a)(2)(A), (C), (D).

23. Although IHS policies operate in the background, each Tribal Contractor has circumstances unique to it that determine the amount of funding that the IHS awards under its contract. We do not unilaterally award ISDA contracts, but instead we negotiate contract terms and conditions with each Tribal Contractor. We approach each contract negotiation as a unique event and the product of negotiation is unique to the particular Tribal Contractor and its circumstances. Often, Tribal Contractors are represented at contract negotiations by consultants or even attorneys who negotiate on behalf of the Tribal Contractor.

24. The amount of the CSC award has generally been based on: (a) the negotiated CSC need of the

Tribal Contractor; (b) the availability of appropriations; (c) IHS policies in effect in any particular year; (d) our agency's prior contract year award to the Tribal Contractor; and (e) the status and timing of any new assumptions of IHS programs by the Tribal Contractor. Should additional CSC funds become available during the fiscal year (due to reductions in CSC funding to other awardees or increases in CSC appropriations from Congress), the Tribal Contractor may have additional funding added to its contract or compact.

25. In 1994, Congress amended the ISDA to include the terms of a uniform (model) contract, but directed that additional terms and the annual funding agreement (AFA) must be negotiated by the parties to the contract. The terms of the model contract were incorporated into the ISDA contracts as the contracts came up for re-negotiation over the next few years. Prior to that, the IHS generally utilized a standard government contract form for memorializing the negotiation between the Tribal Contractor and the IHS. The specific amounts and additional funding terms agreed to between the IHS and the Tribal Contractor would then be incorporated into this format.

26. The IHS and its Tribal Contractors generally execute ISDA contracts and compacts for multiple years, but annually negotiate AFAs. Menominee's Contract No. 239-95-0018, effective January 1, 1995 - December 31, 1995, was executed in late 1994 using the standard government contract form that was still in use at that time, and included modifications (but no AFA). However, Menominee's Contract 239-96-0030, effective January 1, 1996 - December 31, 1996 used the model agreement form set forth in the ISDA, as well as annual funding agreement and modifications to the

AFA. Menominee Contract No. 239-96-030 for fiscal year 1997 (effective January 1, 1997 - December 31, 1997) and fiscal year 1998 (effective January 1, 1998 - December 31, 1998) also used the model agreement with separate annual funding agreements for these years. Menominee entered a new model contract, Contract No. 239-99-014 for fiscal year 1999 (effective January 1, 1999 - December 31, 1999) and fiscal year 2000 (effective January 1, 2000 - December 31, 2000), with separate annual funding agreements for the 1999 and 2000 fiscal years. These contracts and annual funding agreements were negotiated with Menominee pursuant to Title I of the ISDA.

Releases

27. Once the contract term has expired, our Area Office closes out the contract. One step in this process is to submit a Contractor's Release form to the Tribal Contractor. The release states the total amount of funding that the IHS awarded under the contract for each of the fiscal years that the contract had been in effect. Our Contractor's Release form also makes a space available for a Tribal Contractor to state any exceptions for claims that they do not want to release. (See Exhibit 6.) Our office seeks the Tribal Contractor's concurrence and asks the Tribal Contractor to release all claims under the contract or, if it will not, to notify the IHS of claims that the Tribal Contractor wishes to reserve. The IHS imposes no penalty on Tribal Contractors for the failure to execute a release.

28. In my experience, many Tribal Contractors do not sign the release form, and we have continued to renegotiate contracts with them for the following years in the same manner as we have in the past. If a Tribal Contractor refuses to sign the release form, our Contract Specialist closes out the contract by simply

noting in the file that Tribal Contractor declined to sign the release.

29. The release for Contract No. 239-96-0030, was signed on May 26, 1999, by Betty Jo Wozniak, Menominee's Tribal Administrator, as part of our process of closing out this contract number after the Tribe finished operating its self-determination programs under this contract for fiscal years 1996, 1997 and 1998. See Exhibit 6. The annual funding agreements for fiscal year 1996, 1997, and 1998 were negotiated under this contract, and the release applies to the funding received by the Tribe for all three of these years. As can be seen in paragraph one (1) of this release, the Tribe did not specify any particular claim, such as a claim for indirect contract support costs, that it wanted excepted or reserved from the release.

Shortfall Reports

30. Because Congress was aware that it had not appropriated sufficient funds for the IHS to award the full amount of CSC requested by Tribal Contractors, Congress provided, in 25 U.S.C. § 450j-1(c), that the Secretary would submit reports, called "shortfall reports" to the Congress. In response to this statutory reporting directive, the IHS has sought to collect "shortfall" data from each of its twelve Area Offices since at least 1993.

31. Although the IHS has modified the specific data that it has collected over the years, the IHS has generally sought to identify the amount of CSC need that each Tribal Contractor believed was required to operate its ISDA programs and the amount that IHS was able to award for CSC. Then, the IHS would subtract the award from the "need," and the remainder was considered the Tribal Contractor's "shortfall." In some instances, the amount identified as a Tribal

Contractor's CSC need was reached after a negotiation between the Tribal Contractor and the IHS, but this was still considered an estimate that could fluctuate based on indirect cost rate changes or increases or decreases to the funding that was included in the ISDA award. As part of the negotiation, IHS staff were to make certain adjustments to avoid the inclusion of impermissible costs in the CSC need amount, although such calculations were difficult to do in all instances. In other cases, particularly when the IHS was unable to award any CSC for a new program, the amount of CSC that the IHS identified was an unverifiable amount provided by the Tribal Contractor without any review by or negotiation with the IHS. In almost all situations, however, the amount of CSC "need" that is reported was based on unaudited costs, and often contained outdated indirect costs rates, and other non-final amounts.

32. In other words, the IHS never considered its "shortfall" data, in shortfall reports or otherwise to represent an amount that the agency "owed" to a Tribal Contractor or any amount that the agency would one day award to a Tribal Contractor, but merely an estimate or guide for Congress in assessing the need for additional CSC appropriations.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 29th day
of April, 2011

/s/ William F. Fisher
William F. Fisher
Chief Contracting Officer
Bemidji Area Office
Indian Health Service

MAR 08, 2000

The Honorable Ralph Regula
Chairman, Subcommittee on
Interior and Related Agencies
House of Representatives
Washington, D.C. 20515-6015

Dear Chairman Regula:

I am responding to your January 27 letter concerning the policy I recently adopted that will govern the administration of contract support costs (CSC) in the Indian Health Service (IHS) in fiscal year (FY) 2000. In your letter, you requested that I recall the policy and distribute CSC in a manner different than that stipulated by the policy.

I appreciate your past support for the IHS and for the increases you and the Committee have provided for CSC. I am aware, of course, that funding for Indian health programs is limited. However, a priority of mine has always been to strengthen Indian self-determination and thereby carry out the provisions of the Indian Self-Determination Act (P.L. 93-838, as amended)

I would like to take this opportunity to provide a brief history of CSC in the IHS, including the recent activities that led to my adoption of our new policy, IHS Circular No. 2000-01, "Contract Support Cost Policy."

Since 1992 the IHS has had an established, written CSC policy that was developed and implemented in consultation with tribes and tribal organizations. In fact, the policy that I recently adopted is the third CSC policy that has been implemented by the Agency since 1992. Our new policy was developed as a result of the

most extensive tribal consultation to date regarding CSC. As was the case with our two earlier policies, our newly adopted policy instructs Agency personnel on the determination and negotiation of CSC amounts, the allocation of CSC resources, and the reporting of CSC shortfalls to the Congress.

Through FY 1994, CSC appropriations were generally sufficient to fund 100% of the CSC need of tribes and tribal organizations in the IHS. However, beginning in FY 1995, the demand for CSC began to exceed, eventually quite substantially, the amount of appropriations provided by the Congress for that purpose. In my opinion, this was due in large part to two events, both of which stimulated the accelerated assumption of IHS programs by tribes. These events were the passage of the 1994 amendments to the Indian Self-Determination Act (ISDA) and the authorization of the Self-Governance Demonstration Project in the IHS.

Beginning in FY 1995, the significant growth in self-determination contracting and compacting created a demand for additional CSC that has outpaced the availability of CSC appropriations. At that time, the Agency made a determination that it would not alter its allocation policy to provide for a pro rata funding distribution of CSC. The position of the IHS was that the implementation of a pro rata funding distribution would result in a reduction of funding to a significant number of tribes, which would severely disrupt their delivery of health care services. A fundamental element of the IHS CSC policy that I recently adopted is that CSC funding will not be reduced for those tribes presently receiving less than 100% of their CSC need.

When the Agency began experiencing shortfalls in CSC funding, the IHS did what the Congress directed we do in such circumstances. As required by Section

106(c) of the ISDA, the Agency reported annually on the deficiency of CSC funds necessary to provide full-funding for self-determination contracts and compacts. I have also testified each year to Congress on the critical importance of CSC to tribal governments and on the amount needed to fully fund the CSC need. Additionally, I have continually advocated for increased CSC appropriations in the formulation of the President's Budget.

In fiscal year 1999, the Congress provided the Agency an increase of $35 million for CSC and directed that we distribute that increase in a manner that would reduce the inequity in the distribution of CSC in the IHS. This increase was sorely needed, and I am certainly aware that it would not have been made available without your support and advocacy. As a result of consultation with tribal governments, the Agency distributed this increase to those tribes that had the greatest overall CSC need for all programs administered through self-determination contracts and compacts. I believe that this allocation methodology was responsive to concerns expressed by the Committee and Congress that the IHS address the inequity in CSC funding levels of tribes in the IHS system. The allocation of the $35 million increase in this manner enabled the IHS to fund, on average, 86% of the total CSC need associated with IHS contracts and compacts. At the time of the allocation, no tribe was funded at less than 80% of its overall CSC need. The allocation of the increase reduced the gap in CSC funding levels in the IHS considerably.

As part of the 1999 appropriations process, the Congress also requested that the Agency consult with tribes to propose a permanent acceptable solution to the CSC distribution inequity as part of the FY 2000

budget process. The Agency embarked on this consultation with tribes within days after receiving this instruction from the Congress. As I have indicated, the consultation that went into the development of the Agency's solution (i.e., policy) to the CSC distribution inequity was extensive and protracted. My staff provided periodic status reports on the progress of our activities to your staff and other congressional staff on the progress and outcomes of our consultation. Although the policy does not redistribute all CSC on a pro rata basis, it does abandon the historic approach to the Indian Self-Determination (ISD) Fund and the maintenance of a queue system in favor of a pro rata system whereby each eligible tribe with an ISD Fund request receives additional funding proportionate to its overall CSC needs. Those with the greatest unfunded CSC needs will receive the greatest increases in ISD funding under the new policy. The CSC shortfall funding will also be distributed on a similar pro rata basis by providing the greatest CSC increases to those tribes with the greatest unmet CSC needs.

In summary, it is my firm belief that the policy I adopted does address the expectation of Congress as stated in the FY 1999 appropriations committee report. Our analysis of the increase provided for CSC in FY 2000 indicates that there is very little practical variance between the outcomes of the distribution of CSC increases in the manner governed by the policy and other allocation methods. A critically important feature of the new policy is that its allocation provisions were thoroughly discussed with and supported by tribal governments and organizations as required in the instruction the Agency received from the Congress. Over a 9-month period, my staff met with tribal leaders and representatives in a series of special consultation sessions to discuss provisions of the

policy. Additionally, the policy was presented and discussed at numerous forums, including meetings of the National Congress of American Indians, the National Indian Health Board, and the Self-Governance tribes and inter-tribal consortiums. In short, the new CSC policy was developed in close adherence to Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments," May 14, 1998, as well as Department of Health and Human Services and Indian Health policies on tribal consultation and participation.

I assure you of my gratitude for your efforts on behalf of Indian people and the IHS and of my sincere interest in continuing to work with you and the Committee on the many difficult issues concerning CSC. In a recent meeting between Committee staff and IHS officials, the staff of the Committee again expressed its desire that the IHS and the Bureau of Indian Affairs work together with tribal governments to develop a uniform policy to govern the administration and allocation of CSC. I am supportive of such an endeavor and pledge the cooperation of the IHS and its staff in the accomplishment of this worthy goal.

I also want to thank Ms. Loretta Beaumont of your staff for her offer to help coordinate a meeting between you and me to discuss this issue as well as other issues that are of importance to the health of American Indians and Alaska Natives. I look forward to meeting with you in the near future.

Sincerely yours,

/s/ Michael H. Trujillo
Michael H. Trujillo, M.D., M.P.H., M.S.
Assistant Surgeon General
Director

OCT 8, 1999

Dear Tribal Leader:

I would like to report to you the results of our tribal consultation process concerning the allocation of the $35 million increase the Agency received for contract support costs (CSC) in fiscal year 1999. This funding was provided with accompanying guidance from the Congress that directed the Indian Health Service (IHS) to allocate the increase in a manner that would reduce the disparity in the levels of CSC funding among tribes in the IHS system.

Shortly after the $35 million increase was appropriated to the IHS, I directed that consultation activities be initiated with tribal leaders and representatives to discuss the methodology that would be used in the allocation of this funding. Indian tribal leaders and representatives and IHS staff, have discussed the allocation at numerous forums, including meetings of the IHS Contract Support Cost Workgroup, the National Congress of American Indians, inter-tribal consortiums, etc.

Recommendations from the tribal consultation process, along with congressional guidance, resulted in my adoption of an allocation methodology that distributed the funding increase in a manner that is a departure from the allocation provisions contained in our present policy. The $35 million increase has been distributed to tribes that have assumed IHS programs in recent years without receiving any CSC for those assumptions (i.e., tribes on the Indian self-determination fund "queue"). Specifically, the funding methodology allocated the increase to those tribes on the queue that have the greatest overall CSC need for all programs administered through self-determination

contracts and compacts. It is my belief that this distribution methodology begins to address the congressional concern over the inequity in the distribution of CSC in the IHS.

The distribution of the $35 million has required extensive effort on the part of IHS Headquarters and Area Office staff and many tribal representatives. Over 180 Indian self-determination fund requests for tribes were analyzed and final amounts identified. In addition, the Agency's CSC data base was updated to reflect the most current information for 330 tribes that have assumed IHS programs, including the award amounts for contracted programs, CSC needs, and CSC shortfalls. The completion of both of these activities was necessary before the $35 million could be distributed. The distribution of the $35 million has resulted in the IHS being able to fund, on average, 86% of the total CSC need associated with IHS contracts and compacts based on the fiscal year (FY) 1998 CSC shortfall report and the FY 1999 Indian self-determination negotiations.

Although I believe we have appropriately responded to the direction of the Congress, the allocation has not been without difficulty. Just prior to my adoption of the methodology to distribute the $35 million, the Office of General Counsel of the Department of Health and Human Services and the Department of Justice advised me that the allocation methodology was in violation of Section 314 of the Omnibus Appropriations Act, P.L. 105-277, because it paid prior year startup costs as part of the proposed distribution. The IHS has examined various methods that would not pay prior year startup costs but would compensate tribes that otherwise would have been impacted by the interpretation of Section 314. However, I have been

advised by legal counsel that each of these methods would also be in violation of Section 314. Accordingly, the final distribution of the $35 million increase does not pay any startup costs for fiscal years 1994-1998 in consideration of the direction contained in Section 314.

The IHS will shortly issue a newly revised CSC policy that will become effective in FY 2000. This policy was developed in consultation with tribes, tribal organizations, and their representatives. I believe that this policy will address the expectations of Congress as stated in the FY 1999 appropriation committee report. The new policy abandons much of the historic approach to allocating CSC in the IHS and will implement new allocation provisions designed to further reduce CSC funding disparities among tribes.

I want to emphasize that I am committed to continued close collaboration with tribal governments, national Indian organizations, and the Congress with regard to CSC issues and other issues that affect the health of Indian people and the furtherance of Indian self-determination.

Sincerely yours,

/s/ Michael H. Trujillo

Michael H. Trujillo, M.D., M.P.H., M.S.
Assistant Surgeon General
Director

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service
Indian Health Service
Rockville, Maryland 20857

Refer to: OTA

INDIAN SELF-DETERMINATION MEMORANDUM NO. 92-2

CONTRACT SUPPORT COST POLICY

Sec.

1. Background
2. Purpose
3. Definitions
4. New and Expanded Contracts
5. Procedure for Computing Amount of Contract Support Costs
6. Ongoing Contracts
7. Subsequent Years Considerations
8. Supersession

1. BACKGROUND

The development of this policy is in response to section 106(a) of Public Law 93-638, as amended, the Indian Self-Determination Act, which states:

> Section 106. (a)(1) "The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract."

2. PURPOSE

To establish the Indian Health Service (IHS) policy for 1) identifying amounts required for direct and indirect contract support funds; and 2) allocating contract support funds for all Public Law (P.L.) 93-638 contracts. All funds for contract support costs are subject to the availability of funds made available for this purpose.

This policy outlines the procedures to be used to determine the need for contract support costs, and to guide the allocation of these funds.

3. DEFINITIONS

Contract Support Costs are:

A. Reasonable costs for activities which must be carried on by the Indian tribe or tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management but which normally are not carried on by the Secretary in his direct operation of the program, or are provided by the Secretary in support of the program from resources other than those under contract; and

B. Costs which are reasonable, necessary and allowable costs of the contractor, which are allocable to the contract based on applicable Federal cost principles; and

C. Costs which are not provided for under the allocation of program funds available for the contract as defined in P.L. 93-638, as amended, Section 106(a)(1); and

D. Treated as either direct or indirect by the contractor based on applicable cost principles and the contractor's cost allocation policy.

4. NEW AND EXPANDED CONTRACTS

A. The Indian Self-Determination (ISD) Fund will cover certain costs of P.L. 93-638 awards when the award is:

(1) an initial transfer of a program previously operated by the IHS to the tribe or tribal organization, or

(2) to expand current tribal operations through the assumption of additional programs previously operated by IHS, or

(3) to provide initial contract support funding for all new and expanded 638 contracts, including the assumption of programs previously operated by other tribes, tribal organizations, Indian contractors, and for newly recognized tribes.

B. IHS will award funds for contract support costs for new and expanded contracts in the following two categories:

(1) Direct Contract Support Costs:

a. Non-recurring direct contract support costs are costs which are of a non-recurring nature, are otherwise allowable direct contract support costs, and are required for the program to begin operations. These are also referred to as start up costs, but are not intended to be an additional cost category.

b. Recurring direct contract support costs are costs which are of a recurring nature and associated directly with the operation of the program. These funds shall be awarded on a recurring basis.

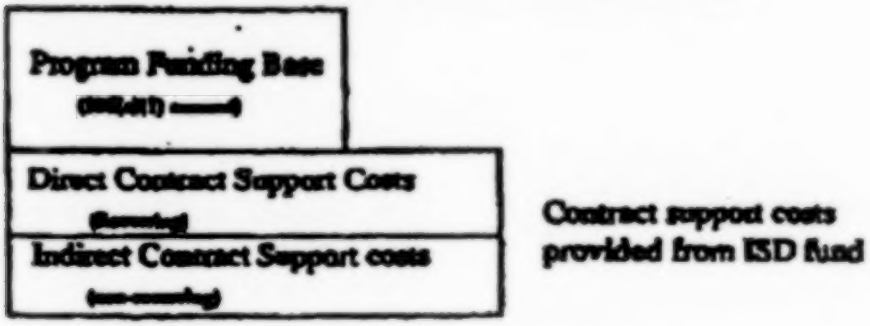
(2) Indirect or Indirect Types of Costs:

Costs incurred for a common or joint purpose, benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved, and which are not funded by other direct costs, and are incorporated in the Indian tribe's or tribal organization's indirect costs reimbursement procedure as negotiated annually with the cognizant Federal agency.

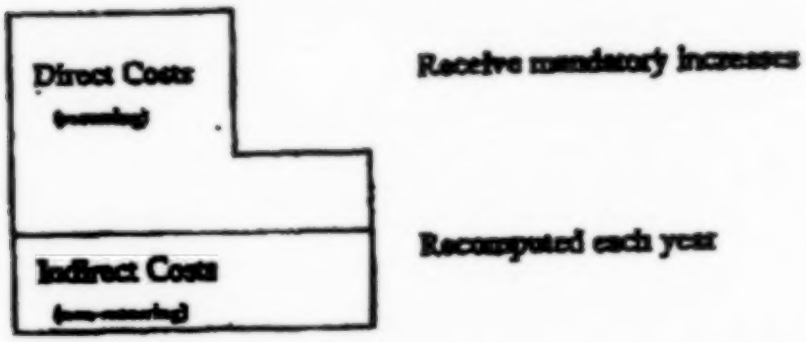
For contractors without negotiated indirect cost rates, indirect-type costs consist of costs which are normally found in indirect cost pools of contractors with rates, and which are negotiated between the contractor and the Area Office using principles of reasonableness, allowability and allocability (see attachment A).

These funds shall be awarded "non-recurring" subject to negotiation in each subsequent year. Those contractors with a surplus of indirect cost support funds will not be allocated additional funds until the need is indicated by the most current negotiated indirect cost rate. (See page 7, Section 6, for special procedures for contracts that have received indirect cost funds as recurring funds). The following illustrations show: 1) total funding for the first year of the contract, and 2) contract costs for subsequent years.

Total funding for first year of the contract



Contract Costs for Subsequent Years



(3) In subsequent years, direct contract support funds will be considered part of the recurring base of the contract, and will receive

mandatory cost increases as do the direct program funds. Amount of indirect contract support funds must be justified each year based on negotiated amounts and any shortfalls are reported to IHS Headquarters for inclusion in the Annual Report to Congress on implementation of P.L. 93-638.

C. (1) Funds for new and expanded contracts will be allocated by IHS Headquarters from the ISD fund on a monthly basis until expended. If permitted by appropriations act, any funds that remain at the end of the fiscal year will be added to any ISD Funds available in the subsequent year. If funds are exhausted at any point in the fiscal year, requests received thereafter will be considered first for funding in the subsequent year from funds appropriated for this purpose.

(2) Area Offices will make requests after receiving proposals for new and expanded contracts. Areas are encouraged to begin discussions with the proposing tribe or tribal organization early to identify the amount of need for contract support costs according to procedures detailed in Section 5 of this policy.

Once the amount of need has been identified, and before the end of the 60-day proposal review period, a request for this amount will be submitted to the IHS Office of Tribal Activities, Division of Self-Determination Services to determine if funds are available for this purpose. The Office of Tribal Activities will respond immediately to advise if the funds are available.

While a CSC need may be requested which is greater than the amount determined to be available, the available amount will be the basis for consideration of approval or declination of proposals, and any subsequent award. Deficiencies for existing contracts will be included in the annual report to Congress required by Section 106(c) of the Act.

(3) The requested amount will be the total of indirect and direct contract support costs for each project.

(4) If funds from the ISD Fund are inadequate to fully fund all requests, then requests to be funded that month will be selected based on the earliest receipt date.

5. PROCEDURE FOR COMPUTING AMOUNT OF CONTRACT SUPFORI COSTS

A. Direct Contract Support Costs

For new and expanded contracts, Area Offices will identify the amount needed for direct contract support costs in accordance with the following:

A detailed budget will be prepared for first-time contractors (new and expanded) detailing amounts to be considered as direct program funds, indirect and indirect type contract support costs, and direct contract support costs.

The amount of recurring direct contract support costs will be determined by negotiation between the recipient and the Area Office (see definitions section for direct contract

support costs). Only categories of cost which are not contained in either the indirect cost pool or the amount computed pursuant to Section 106(a)(1) can be considered as direct contract support costs. The Area Offices and recipients must agree on the amount of direct contract support costs which will be recurring in future years.

"Recurring" direct contract support costs which may not be in a contractor's indirect cost pool are:

- Unemployment tax on direct program salaries.
- Workers compensation insurance on direct program salaries.
- Cost of retirement and other fringe benefits for direct program personnel in excess of amount funded within P.L. 93-638, as amended, Section 106(a)(1).
- Long distance telephone charges.
- Postage allocable to direct programs.
- Discipline specific training for direct program personnel not funded in the 106(a)(1) amount.

The Area Office will also work with the contractor to identify non-recurring direct contract support costs necessary as one time start up costs. These must be required to begin operations. They are not intended to be a program enhancement, and cannot be items of cost included in the 106(a)(1) amount. Examples may include the following:

- Purchase of computer hardware and software.
- Required training and staff development.
- Systems development.
- Equipment and furniture.

Items listed above as examples of recurring and non-recurring direct contract support costs must be justified as such and negotiated with the Area Office. Items not included as examples above, but requested and justified by contractors shall be submitted by the Area Office to IHS Headquarters, Division of Self-Determination Services, for approval. This will contribute to greater consistency from Area to Area.

A single item of cost to be funded shall not be accounted for both in the computation of direct costs, and also in the computation of indirect or indirect-type costs. However, a type of cost may be either direct or indirect depending on the level or function of the organization to which it applies The Area Office shall ensure that costs are reasonable, necessary, and not duplicative.

To the extent that the Area Office and the contractor cannot agree on an item(s) of cost, the disputed items shall be submitted to the Director, IHS, through the IHS Office of Tribal Activities, Division of Self-Determination Services.

The following is a description of the methodology to be used in computing the amount required for indirect contract support costs.

B. Indirect or Indirect Type Costs

For all contractors, Area Offices will identify the amount required for indirect costs of awards (12 months of operation) for each contract as follows:

(1) Recipients with Established Indirect Cost Rates

The amount of indirect costs expected to be incurred under awards by recipients with rates which have been negotiated or are being negotiated with the cognizant Federal agency will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose.

(2) Recipients without Established Indirect Cost Rates

Indirect types of costs may be computed by negotiating amounts for the following examples of "indirect-types of costs" listed on the following page. These examples are those most commonly found in the indirect cost pools of recipients with rates. The total amount negotiated for these items will be considered as the recipient's indirect cost for purposes of this allocation procedure.

Management and Administration	Facilities and Equipment	General Services and Expenses
Governing Body	Building Rent/Lease/Cost Recovery	Insurance and Bonding
Management and Planning	Utilities	Legal Services
Financial Management	Housekeeping/ Janitorial	Audit
Personnel Management	Building and Grounds	General Support Services
Procurement/Material Management	Repairs and Maintenance	
Human Resources Management	Equipment	
Property Management		
Records Management		
Data Processing		
Office Services		

Guidelines for the Principles Involved in Negotiating Indirect Costs

A plan for allocation of indirect costs will be required to support the distribution of any indirect costs related to the contracted program. All indirect costs included in the plan will be supported by accounting records which will substantiate the propriety of the indirect costs. The allocation plan should cover all indirect costs of the contractor, and contain, but not necessarily be limited to 1) the nature and extent of services provided and their relevance to the contracted program, 2) the items of expense to be included in the indirect cost pool, and 3) the methods to be used in distributing cost.

The Office of Management and Budget (OMB), Circular No. A-87, Cost Principles for State and

Local Governments, establishes principles and standards for determining indirect costs applicable to contractors (local governments and federally recognized Indian tribal governments). Further, the circular discusses allowable and unallowable indirect costs.

6. ONGOING CONTRACTS

The amount of indirect contract support funds representing the previous year's base will be distributed to Areas "recurring" to fund each Area's indirect cost need. Each contractor's need for indirect contract support shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If funds available in the Area's indirect cost base are not adequate to meet total requirements, then the amount available shall be distributed according to each contractor's proportion of total need. These funds will be awarded to the contractor as non-recurring funds. (See 4.A(3) for treatment of direct contract support costs.)

Each year, Areas are required to report additional needs for indirect contract support funds beyond the amount provided in their previous year's recurring base, or any surplus of funds provided in their recurring base based on current year needs.

Transition Period

Some Areas have previously allocated indirect contract support funds as recurring funds to contractors. However, the purpose of this policy is to establish a uniform allocation process for indirect contract support funds, and will result in these funds being allocated as non-recurring funds to contractors Agency wide.

It is not intended for Areas to reduce contract amounts of indirect contract support funds previously allocated as recurring funds without the approval of the contractor. Those contractors with a surplus of indirect contract support funds will not be allocated additional indirect contract support funds until their most current negotiated indirect cost rate indicates an additional requirement for these funds. Mandatory increases for self-determination contracts should be provided only on the recurring base amount (excluding indirect contract support) since actual needs will be negotiated each year for the indirect cost amounts.

7. SUBSEQUENT YEARS CONSIDERATIONS

A. Areas shall maintain a historical record of funds awarded in each of the following categories:

a) direct program funds

b) direct contract support funds

c) indirect cost funding

d) indirect-type cost funding

B. Federal indirect cost negotiators should be requested to highlight changes, if any, in the contractor's annual cost allocation plan (treatment of items of cost) as an exhibit to the negotiated indirect cost agreement.

C. Contractors and Area Offices must re-negotiate the contractors indirect type cost budget annually if the contractor does not have a formal negotiated indirect cost rate.

D. The same cost allocation rules applying to those contractors with formally negotiated

indirect cost agreements will be applicable to those contractors without formally negotiated indirect cost rates.

8. SUPERSESSION

This issuance supercedes any policies or instructions previously issued regarding the allocation of Contract Support Funds.

/s/ Everett R. Rhoades
Everett R. Rhoades, M.D.
Assistant Surgeon General
Director

ATTACHMENT A

PRINCIPLES OF REASONABLENESS, ALLOWABILITY AND ALLOCABILITY

REASONABLE COSTS

A cost is reasonable if in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of the reasonableness of specific costs must be scrutinized with particular care in connection with contractors or separate programs thereof which receive the preponderance of their support from awards made by Federal agencies. In determining the reasonableness of a given cost, consideration shall be given to:

a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the contractor or the performance of the contract.

b. The restraints or requirements imposed by such factors as generally accepted sound business practices, arms length bargaining, Federal and State laws and regulations, and terms and conditions of the contract.

c. Whether the individuals concerned acted with prudence in the circumstances, considering their responsibilities to the contractor, its members, employees, and clients, and the Government.

d. Significant deviations from the established practices of the contractor which may unjustifiably increase the contract costs.

ALLOCABLE COSTS

A cost is allocable to a particular cost objective in accordance with the relative benefits received. A cost

is allocable to a contractor if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

1) Is incurred specifically for the contract.

2) Benefits both the contract and other work and can be distributed in reasonable proportion to the benefits received.

3) Is necessary to the overall operation of the contract, although a direct relationship to any particular cost objective cannot be shown.

Any cost allocable to a particular contract or other cost objective under these principles may not be shifted to other Federal contracts to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the contract.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICES
INDIAN HEALTH SBRVICE
ROCKVILLE, MARYLAND 20857

REFER TO: OAM

INDIAN HEALTH SERVICE CIRCULAR NO. 96-04

CONTRACT SUPPORT COSTS

Sec.

1. Purpose
2. Authorizing Legislation
3. Definitions
4. Process
5. Supersedure
6. Effective Date

Circular Exhibit 96-04-A: Section 106, Indian Self-Determination and Education Assistance Act, as Amended

Circular Exhibit 96-04-B: Contract Support Costs Calculated Using the 80/20 Method

Circular Exhibit 96-04-C: Contract Support Costs Calculation Based on a Detailed Analysis

1. PURPOSE. The purpose of this circular is to provide instructional guidance on:

   - Determining amounts of start-up, direct, and indirect contract support costs (CSC)

- Allocating pools of Indian Health Service (IHS) funding available for CSC
- Prioritizing tribal requests for funding of CSC
- Reporting by the IHS to all tribes and to the Congress

These instructions are not regulations establishing program requirements and are not intended to bind agency personnel. These instructions are intended to provide guidance to IHS personnel to determine and allocate CSC, while allowing judgment and prudence in individual circumstances

2. AUTHORIZING LEGISLATION. This circular is authorized pursuant to the Transfer Act, title 42 United States Code (USC) §2001 and implementing regulations in Title 42 of the Code of Federal Regulations §36.3. The development of this circular has involved the active participation of representatives from Indian tribes. Since 1992, the procedures discussed in this circular have been applied to contracts awarded pursuant to Title I of the Indian Self-Determination and Education Assistance Act, Public Law (P.L.) 93-638, as amended. The CSC process has also been applied to compacts awarded to tribes that have been selected to participate in the Tribal Self-Governance Demonstration Project (SGDP) pursuant to Title III of P.L. 93-638, as amended. Section 106 of P.L. 93-638, as amended, authorizes funding for all Indian Self-Determination (ISD) and Self-Governance agreements under the Act. Section 106 is provided as Exhibit 96-04-A to this circular, and is cross-referenced to the pertinent sections where instructions or examples have been provided.

3. DEFINITIONS.

A. Award. An agreement authorized under Title I (contract) or Title III (compact) of P.L. 93-638, as amended.

B. Awardee. A recipient (tribe or tribal organization) of an award as defined above.

C. Contract Proposal. Refer to the regulations implementing P.L. 93-638, as amended, and Title 25, USC.

D. Recurring Funds. Contract or compact funds that do not require rejustification each year to the Secretary. Annual increases are provided through congressional mandatory increases or other resource allocation methodologies applicable to the respective funding category of the award.

E. Non-Recurring Funds. Funds that require a rejustification annually, and are awarded based upon an annual resource allocation methodology that considers or is dependent upon other factors (e.g., an indirect cost rate applied to a direct program base that may change the amount to be reimbursed from a single agency as the programs under contract continue to increase).

F. Programs, Functions, Services, and Activities (PFSA). The PFSA including those administrative activities supportive of, but not included as part of, service delivery programs that are otherwise contractible, without regard to the organizational level within the department that carries out such functions, as authorized under P.L. 93-638, as amended.

G. Tribal Shares. A term that refers to a tribe's equitable share of Area office and Headquarters resources only. This definition was originally adopted and utilized in negotiating and awarding Annual Funding Agreements (AFA) under Title III, P.L. 93-638, as amended, and is being consistently applied to Title I contracts as authorized under P.L. 93-638, as amended. This term does not refer to a tribe's equitable share of a service unit or program base, which may also be included in a negotiated funding agreement.

H. Self-Governance Request.

(1) Tribes entering the SGDP (Title III) the first year:

The tribe's application to the IHS for a Negotiation Grant, which is subsequently approved for the tribe's participation in the SGDP. The application must include evidence of having completed a sufficient planning activity as described in the Negotiation Grant application instruction.

(2) Tribes joining an existing compact:

The tribe's written notice to the IHS, which is subsequently approved, that it intends to join an existing compact.

(3) Tribes negotiating for new or expanded programs in a subsequent year's AFA:

The tribe's written notice to the IHS that it intends to negotiate for additional programs.

To be considered a valid request for purposes of establishing placement on the ISD priority list,

H1, 2 or 3 above must include a clear description of the programs to be negotiated, date that the program operations are to be assumed, or estimate of the amount of program funding required, and the amount of contract support funding required.

4. PROCESS.

A. Determination Amounts of Start-Up, Direct, and Indirect CSC.

(1) Determining the Amount of the Award. Section 106(a)(1) and 106(a)(2) of the P.L. 93-638, as amended, provides for funding of contract and compact awards for program costs and CSC respectively. Section 106(a)(1) provides the awardee the right to the funding the Secretary would have otherwise provided for the PFSA awarded. In addition, section 106(a)(2) authorizes funding that represents costs associated with tribal expenses or PFSAs either not experienced by the Secretary or provided to the Secretary from resources not available to the awardee.

(2) Providing for Lost Reimbursement. Throughout the operation of the program by the awardee, total contract costs, including CSC, are eligible to be reimbursed as either direct or indirect costs. Since tribes often operate more than one program, many of the costs incurred by the awardee are reimbursed through an indirect cost allocation process, usually negotiated by the cognizant agency. Section 106(a)(3) provides authority for tribes to

recover costs in this manner, whether they are indirect in nature (benefiting multiple programs) or additional costs associated with operating a single program.

Since some, but not all, of the funds provided in section 106(a)(2) represent costs that are eligible to be reimbursed through this indirect cost recovery method, the procedures below are intended to ensure that needs are accurately identified but avoid a duplication of funding.

For service unit assumptions, or partial service unit assumptions, the costs historically incurred by the IHS will be reviewed to identify types of costs that are similar in nature to those costs that are included in the awardee's indirect cost pool. Those costs that are in the awardee's indirect cost pool that are similar in nature to the costs incurred by the IHS will be considered as duplicative for purposes of funding for administrative "overhead" purposes (section 106(a)(3)(A)(ii)). In determining whether such costs are similar in nature, the review will consider both the cost category label (travel, supplies, etc.) and how the funds were spent by the IHS.

a. Start Up Costs. Section 106(a)(5) states, "Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be

incurred on a one-time basis pursuant to the contract necessary:

(i) To plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(ii) To ensure compliance with the terms of the contract and prudent management.

Examples include:

- Purchase of computer hardware and software
- Required training and staff development
- Systems development (establishing required administrative and other health management systems)
- Equipment and furniture to support the administrative unit

b. Direct CSC. Requirements for these costs will be determined by negotiation between the awardee and the Secretary. Costs for activities that are not contained in either the indirect cost pool (or indirect cost type budget) or the amount computed pursuant to section 106(a)(1) can be funded as a direct CSC. These funds shall be awarded on a recurring basis.

Examples include, but are not restricted to:

- Unemployment taxes on direct program salaries
- Workers compensation insurance on direct program salaries
- Cost of retirement for direct program salaries
- Long distance telephone charges
- Postage
- Training required to maintain certification of direct program personnel

Items listed above as examples of startup costs and direct CSC must be justified as such and negotiated with the Area office. Items not included as examples above, but requested and justified by awardees shall be submitted by the Area office to IHS Headquarters, Office of Administration and Management (OAM), for approval. This will contribute to greater consistency from Area-to-Area.

c. Indirect or Indirect Types of Costs. Guide-lines for the Principles Involved in Negotiating Indirect Costs:

A plan for allocation of indirect costs will be required to support the distribution of any indirect costs related to the awardee's program. All indirect costs included in the plan will be supported by accounting records that

will substantiate the propriety of the indirect costs. The allocation plan should cover all indirect costs of the awardee, and contain, but not necessarily be limited to: (1) the nature and extent of services provided and their relevance to the awardee's program; (2) the item of expenses to be included in the indirect cost pool, and (3) the methods to be used in distributing cost.

The Office of Management and Budget (OMB) circulars establish principles and standards for determining indirect costs applicable to the awardee. Public Law 103-413 has made modifications to the OMB cost principles otherwise applicable to tribes and tribal organizations.

(i) Awardee with Negotiated Indirect Cost Rates. The amount of indirect costs expected to be incurred under awards by tribes or tribal organizations with rates that have been negotiated or are being negotiated with the cognizant Federal agency, will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose. The amount to be reimbursed will be consistent with the individual awardee rate agreement, reflecting any exclusions required by the agreement.

(ii) Awardee without Negotiated Indirect Cost Rates (Guidelines for Agency Negotiators). A lump sum amount for "indirect types of costs" may be computed for awardees who do not have formally negotiated agreements with their cognizant agency for reimbursement

under an indirect cost rate. This annual lump sum amount may be calculated by negotiating a fixed amount for "indirect types of costs." Categories of costs often considered "overhead" or "indirect-type" are generally in the categories of Management and Administration, Facilities and Equipment, General Services, and Expenses. Examples of indirect costs are:

Examples of "Overhead" or "Indirect-type" Costs

Management & Administration	Facilities & Equipment	General Services & Expenses
Governing Body	Building	Insurance & Legal Services
Management & Planning	Utilities	Audit
Financial Management	Housekeeping/Janitorial	General
Personnel Management	Building & Grounds	Interest
Procurement/Material	Repairs & Maintenance	Depreciation
Human Resources	Equipment	
Property Management		
Records Management		
Data Processing		
Office Services		

(3) Alternative Methods for calculating Amount of Section 106(a)(1) Funds in Area Office and Headquarters "Tribal Shares". With respect to amounts to be considered as the direct program base (for the purpose of calculating indirect or indirect-type costs) from amounts of PFSAs transferred from Areas and Headquarters "Tribal Shares," at the option of the awardee, the IHS and the awardee will either:

a. Conduct a case-by-case detailed analysis of the "purpose for which the funds were utilized by the Secretary" in order to avoid a duplication in amounts funded.

In cases where a detailed analysis is performed, it will be conducted in the following manner:

Area/Headquarters tribal shares will be reviewed to identify types of costs that are similar in nature to those costs that are included in the awardee's indirect cost pool. Those costs that are in the awardee's indirect cost pool that are similar in nature to Area/Headquarters tribal shares will be considered as duplicative for purposes of funding for administrative or "overhead" purposes (Section 106(a)(3)(A)(ii)).

In determining whether such costs are similar in nature, the review will consider both the cost category label (travel, supplies, etc.) and how the funds were spent by the IHS.

b. Apply the following "split" of total Area and Headquarters tribal shares as specified below:

In the absence of a detailed analysis by the awardee and the IHS, 80 percent of Area/Headquarters tribal shares will be considered as direct program funds (section 106(a)(3)(A)(I)) and 20 percent of such tribal shares will be

considered as funding for administrative or "overhead" purposes (section 106(a)(3)(A)(ii)).

Once an amount is computed for a direct program or an indirect or overhead purpose under method a. or b. above, it will be used in accordance with the terms of the rate agreement or alternative method provided herein, for calculating the amount required for indirect or indirect type costs. The balance of the tribal shares not considered as direct program expenses (and therefore not used to calculate indirect cost funding requirements) will be considered as available for CSC for the respective awardee. Any such balance, it in excess of the CSC requirement, shall also remain with the awardee. Any excess CSC requirements not funded by the portion of the Area or Headquarters tribal shares to be considered as available for CSC, will be eligible for payment from the ISD fund, and the processes specified in this circular for allocation of funding in this pool will apply.

Exhibit 96-04-B illustrates how the 80/20 method would be calculated, and Exhibit 96-04-C illustrates how a detailed analysis would be calculated.

(4) Allocating Funding Available for CSC. Essentially three pools of funding are contained in the single IHS budget activity for CSC. The first pool represents an increase in the IHS

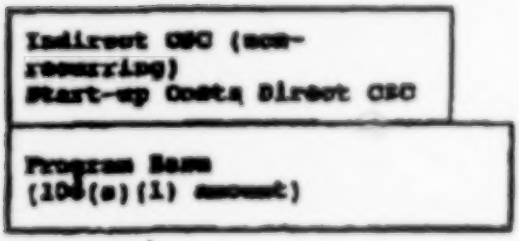
appropriation for CSC for new and expanded awards. The second pool represents amounts awarded in the prior year that are made available to the IHS on a recurring basis. The third pool represents amounts provided for mandatory increases on the prior year "base" and shortfall funds, it appropriated. Each one has funding priorities and eligibility requirements for costs to be reimbursed.

a. Pool No. 1 – The Indian Self-Determination Fund. The ISD Fund will cover CSC when an award is:

(i) (1) An initial transfer of a program previously operated by the IHS to the tribe or tribal organization; or (2) to expand current tribal operations through the assumption of additional shares of PFSAs previously operated by the IHS, regardless of the organizational level at which it was operated; or (3) assumption of programs previously operated under awards to other tribes, tribal organizations, contractors, and for newly recognized tribes; or (4) new or expanded programs available because of new appropriations, excluding mandatory increases.

(ii) Initial Funding Period-First Come First Served. Funds for new and expanded programs will be allocated by IHS Headquarters as expeditiously as possible. Approved requests for CSC for new and expanded programs will be funded at 100 percent of the

approved amount on a first come first served basis. Allocation will be based on a priority list until funding for the ISD funds is exhausted. If permitted by appropriations act, any funds that remain in the ISDF at the end of the year will be added to funds to be made available in the subsequent year. If funds are exhausted in any fiscal year (FY), tribes on the priority list will remain on the priority list and be considered in priority order when funding is made available by appropriation or reprogramming.



(iii) Priority Determined by Date of Request. A priority list for each FY will be developed for every tribe with a requested start date in the proposal (Title I) or request (Title III) in that FY. Tribes will be placed on the priority list within the FY based on:

(a) The date of receipt by the IHS Area office of a Title I contract proposal.

(b) The date of receipt by the IHS Area office of a request to negotiate a Title III award.

(iv) Roles and Responsibilities. Tribes will provide either (a) or (b) above to the Area office. The Area office will provide a copy to OAM, and in the case of Title III, an additional copy will be provided to the Office of Tribal Self-Governance (OTSG). In providing either (a) or (b) above, the tribe will include a clear estimate of the amount of CSC required.

The Area office will be responsible for negotiating the CSC and forwarding the recommendation to OAM. In the case of Title III, an additional copy will be forwarded to the OTSG. The Area office shall ensure that costs are reasonable, necessary, and not duplicative. To the extent that the Area office and the awardee cannot agree on an item(s) of cost, the disputed item(s) shall be submitted to the Director IHS, through the Headquarters OAM.

(v) Information and Documentation by IHS. The priority list will be maintained by OAM and distributed quarterly to Area offices. The list will include tribe or tribal organization, proposed start date, date of request or proposal, estimated amount of the program costs to be awarded, estimated amount of CSC approved and awarded, and remaining funds available. The

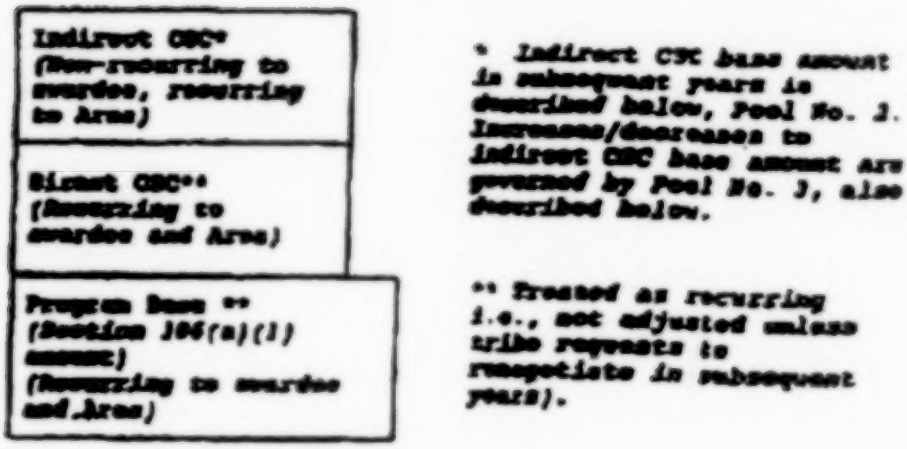
OAM will revise estimated amounts of CSCs as additional data becomes available through negotiations.

(vi) Changes in Start Date. While awaiting award of ISD funding, tribes or tribal organizations may choose to delay their starting date, if necessary, because of the delay in the award of contract support funding. Such choice shall not change the placement of the tribe or tribal organization on the priority list. The priority list shall be maintained by OAM and reviewed periodically to ensure the validity of start dates and the amounts needed.

If a tribe changes the FY start date for any reason other than solely the lack of CSC funding, it will be placed in the new FY by its original date.

(vii) Subsequent Funding Periods. Beginning in year 2, direct contract support and section 106(a)(1) funds will be considered part of the recurring base of the award. Mandatory funding increases will be provided based on congressional appropriation. The amount of direct contract support funds may be renegotiated annually at the option of the awardee. The amount of indirect contract support funds must be justified each year based on the

awardee's indirect cost agreement or mutually negotiated amounts. Any shortfalls in funding are reported to the Headquarters OAM by Area offices and the OTSG for inclusion in required reports to the Congress, and other reporting to tribes.



b. Pool No. 2 Prior Year CSC Base (On-going Awards). The amount of indirect contract support funds representing the previous year's base will be distributed to Areas as "recurring" to fund each Area's indirect cost need. Each awardee's need for indirect CSC shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If the funds available in the Area's indirect cost base are not adequate to meet all awardee's requirements, then the amount available shall be distributed according to each awardee's proportion of total need, except that

prior year funds should not be reduced if justified as described below. These funds will be awarded to the contractor as non-recurring funds.

c. Pool No. 3 Mandatory Increases/Shortfall Funds. Mandatory increases that represent a percentage of the Area's prior year recurring indirect cost base are distributed annually as available. Additional shortfall funds may also be made available to the IHS and allocated to Area offices for this purpose. Since awardees are required to rejustify their needs for indirect CSC each year, amounts required for indirect CSC may exceed the amount available for this purpose. Mandatories should be allocated in such a manner as to provide increases to awards based on each awardee's proportion of total additional need. If additional need is proportionately greater for some awardee's, they will receive a greater percentage of CSC mandatories and shortfall funds.

Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the ISDA. Awardee should expect to receive these funds continuously, only if they continue to be justified for at least the same amount or greater annual need. They are awarded as non-recurring funds to enable the Area to adjust amounts

previously awarded if the amount of costs allocated to the IHS for reimbursement should decrease. If amounts previously awarded for indirect CSC are not justified by an awardee in a subsequent year, they will be made available for distribution to other awardees in the Area with unfunded CSC needs for this purpose.

Note: *It is not intended for Areas to reduce contract amounts of indirect contract support funds allocated prior to FY 1992 (original date of ISDN No. 92-2, Contract Support Cost Policy was February 27, 1992) as recurring funds without approval of the contractor.*

B. Requirements for reporting and Documenting Amounts of CSC Funds Available, Needed, and Requested. Areas shall maintain an historical record of funds negotiated and awarded in each of the categories:

- Direct program funds
- Start-up costs
- Direct contract support funds
- Indirect cost funding
- Indirect-type cost funding
- Indirect cost rates
- Types of rates
- Types of bases
- Pass through/exclusions

5. SUPERSEDURE. Indian Self-Determination Memorandum No. 92-2, "Contract Support Costs

Policy," dated February 27, 1992, and any policies or instructions previously issued regarding the allocation of contract support funds.

. EFFECTIVE DATE. The policy and procedures contained in this circular are retroactive to April 1, 1996, upon signature by the Director, IHS.

/s/ Michael H. Trujillo
Michael H. Trujillo, M.D., M.P.H., M.S.
Assistant Surgeon General
Director

Indian Self-Determination and Education and Assistance Act Public Law 93-638, As Amended

Section 106: (Contract Funding) (25 USC Sec. 450j-1)

[CONTRACT FUNDING]

SEC. 106 (25 USC 450j-1). (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support coats which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which——

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding

under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, Service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under section 106(a)(1).

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to thin paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 8.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) The amount of funds required by subsection (a)—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the coots of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)[450j(c)]. Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

(c) The Secretary shall provide an annual report in writing on or before May 15 of each year to the Congress on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and contract support costs of tribal

organizations under self-determination contracts during the previous fiscal year;

(2) an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the current fiscal year;

(3) the indirect costs rate and type of rate for each tribal organization negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costa included in the indirect cost pools; and

(6) an accounting of any deficiency of funds needed to maintain the preexisting level of services to any tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle to a different accounting cycle, as authorized by section 105(d).

(d)(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, state, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(f) Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to enactment of Chapter 75 of Title 31, United States Code, or any other required final audit report.

Such notice shall net forth the right of appeal and hearing to the board of contract appeals pursuant to section 110 (450m-1). For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31, United States Code, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 16 of the Indian Reorganization Act of June 18, 1934 (25 USC 476, 40 Stat. 984).

(g) Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(h) In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(i) On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(j) Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the

management or operation of programs under this Act.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(l) (1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(m) The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract, and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(n) To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a), the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(o) Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

Contract Support Costs Calculated Using the 80/20 Method

Assumptions:

1. Tribe A has $100,000 in Area and Headquarters Tribal Shares
2. Indirect cost rate = 30%
3. New budgeted tribal wages = $48,000
4. Direct Contract Support = 15% of wages
5. No excluded items
6. Other Direct Contract Support Costs = $5,000

Expanded program base $100,000 tribal shares x 80%	$80,000
DCSC fringe $48,000 wages x 15%	$7,200
Other DCSC	$5,000
Sub-total direct	$92,200
Less excluded items	$0
Total direct	$92,200
x 30% indirect cost rate	$27,660
TOTAL Direct and Indirect	$119,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$27,660
TOTAL CSC	$39,860
Less tribal shares available for CSC	$(20,000)
TOTAL ISD Request	$19,860

Tribe A would receive $100,000 from tribal shares and $19,860 would be requested from the ISD fund.

Contract Support Costs Calculation Based on a Detailed Analysis

Assumptions:

1. Tribe B has $100,000 in Area and Headquarters tribal shares
2. Detailed analysis indicates that $10,000 of tribal shares are similar in nature to costs included in tribe B's indirect cost pool
3. Indirect cost rate = 30%
4. New budgeted tribal wages = $48,000
5. Direct contract support fringe = 15% of new wages
6. Other direct contract support = $5,000
7. No excluded items

Expanded program base $100,000-$10,000	$90,000
DCSC fringe $48,000 x 15%	$7,200
Other DCSC	$5,000
Sub-total direct	$102,200
Less excluded items	$0
Total direct base	$102,200
x 30% indirect cost rate	$30,660
TOTAL Direct and Indirect	$132,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$30,660
TOTAL CSC	$42,860
Less tribal shares available for CSC	($10,000)
TOTAL ISD Request	$32,860

Tribe B would receive $100,000 from tribal shares and $32,860 would be requested from the ISD fund.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES
INDIAN HEALTH SERVICE
ROCKVILLE, MARYLAND 20857

INDIAN HEALTH SERVICE CIRCULAR
NO. 2000-01

CONTRACT SUPPORT COSTS

Section

1. Purpose
2. Policy
3. Authorizing Legislation
4. Definitions
5. Process
6. CSC Shortfall Report to Congress
7. Supersedure
8. Effective Date

Circular Exhibit 99-93-A	Indian Self-Determination and Education Assistance Act, Public Law 93-638, as Amended, Section 106: [Contract funding] [25 USC Sec. 450j-I]
Circular Exhibit 99-03-B	CSC Calculation Based on a Detailed Analysis
Circular Exhibit 99-03-C	Calculated Using the 80/20 Method
Circular Exhibit 99-03-D	Allocation of ISD Funds Against CSC Requirements for New and Expanded Awards (Bottom-Up Approach)

Circular Exhibit 99-03-E	Allocation of Pool No. 3 Funds Against Overall CSC Shortfall for Ongoing Contracts (Weighted Need Allocation)
Circular Exhibit 99-03-F	CSC Shortfall Report Format
Circular Exhibit 99-03-G	ISD Request Form

Section 1. PURPOSE.

This policy is intended to provide guidance to both tribal and agency personnel in the preparation and negotiation of requests for contract support funding in support of new and continuing Public Law (P.L.) 93-638 compacts and contracts. It will provide instructional guidance on:

- Determining amounts of startup, direct, and indirect contract support costs (CSC);
- Allocating pools of Indian Health Service (IHS) funding available for CSC;
- Prioritizing tribal requests for funding of CSC; and
- Reporting by the IHS to all tribes and to the Congress.

These instructions are not regulations establishing program requirements.

Section 2. POLICY.

It is the policy of the IHS to provide for a uniform and equitable system of distributing CSC funds to new and existing P.L. 93-638 compacts and contracts, and to preserve and

support each awardee's right to contract under P.L. 93-638.

Section 3. AUTHORIZING LEGISLATION.

This Circular is authorized pursuant to the Transfer Act, Title 42 United States Code §2001, and implementing regulations in Title 42 of the Code of Federal Regulations (C.F.R.) §36.3. The development of this Circular has involved the active participation of representatives from Indian tribes. The procedures discussed in this Circular will be applied to contracts awarded pursuant to Title I of the Indian Self-Determination and Education Assistance Act (ISDEAA) and to compacts awarded to tribes that have been selected to participate in the Tribal Self-Governance Demonstration Project (SGDP) pursuant to Title III of P.L. 93-638, as amended. Section 106 of P.L. 93-638, as amended, authorizes funding for all Indian Self-Determination and Self-Governance agreements under the Act. Section 106 is provided as Exhibit 99-03-A to this Circular, and is cross-referenced to the pertinent sections or paragraphs where instructions or examples have been provided.

Section 4. DEFINITIONS.

(A) Award. An agreement authorized under Title I (contract) or Title III (compact) of P.L. 93-638, as amended, including the associated Annual Funding Agreement (AFA).

(B) Awardee. A tribe or tribal organization that is the recipient of an award as defined above.

(C) CSC Available. Total CSC funding allocated to an awardee (including any portion of tribal shares that are available for CSC requirements pursuant to paragraph 5(A)(3) of this Circular).

(D) CSC Requirement. The full amount of CSC need (Indian Self-Determination Fund [ISD] plus ongoing contracted or compacted programs) as determined under this Circular pursuant to section 106 of P.L. 93-638, as amended.

(E) Contract Proposal. A proposal for programs, functions, services, or activities that the Secretary is authorized to perform but which the Indian tribe or tribal organization is not now carrying out (see definition at 25 C.F.R. Section 900.6). The requirements of a self-determination contract proposal can be found in 25 C.F.R. Section 900.8.

(F) Indian Self-Determination (ISD) Fund. Funds specifically appropriated by Congress to pay CSC requirements associated with new or expanded programs under the ISDEAA. In fiscal years where the Congress does not specifically appropriate funds for an "ISD Fund," the ISD Fund will consist of those CSC funds that are identified by the Director, IHS, for providing CSC for new or expanded awards, to the extent not prohibited by law.

(G) Programs, Functions, Services, and Activities (PFSA). PFSAs are those programs, functions, services, and activities that are

contractible under the ISDEAA, including those administrative activities supportive of, but not included as part of service delivery programs that are otherwise contractible, without regard to the organizational level within the department that carries out such functions (as authorized under P.L. 93638, as amended).

(H) ISD Programs. PFSAs associated with an ISD request that are eligible for ISD funding in accordance with paragraph 5(B)(1)(a) of this Circular.

(I) Non-ISD Programs. All PFSAs operated by an awardee, exclusive of PFSAs associated with an ISD request that are operated by an awardee in accordance with paragraph 5(B)(1)(a) of this Circular.

(J) Non-Recurring Funds. Funds that require a rejustification annually, and are awarded based upon an annual resource allocation methodology that considers or is dependent upon other factors (e.g., an indirect cost rate applied to a direct program base that may change the amount to be reimbursed from a single agency as the programs under contract continue to increase).

(K) Ongoing CSC Shortfall. This is the portion of the "total CSC shortfall" less CSC shortfall associated with awardees' ISD programs.

(L) Recurring Funds. Contract or compact funds that do not require rejustification each year to the Secretary. Annual increases are provided through mandatory

increases or other resource allocation methodologies applicable to the respective funding category of the award.

(M) Self-Governance Request. A Self-Governance request is defined as any one of the following:

(1) An application from a tribe or tribal organization to enter into the SGDP for the first time, including Title III; or

(2) An application from a tribe or tribal organization to join an existing self-governance compact; or

(3) An application from a tribe or tribal organization to negotiate for new or expanded programs in a subsequent year's AFA.

(N) Total CSC Shortfall. The difference between the total CSC requirement and the total CSC allocated to the awardee.

(O) Tribal Shares. A term that refers only to an awardee's equitable share of PFSAs associated with Area Office or Headquarters resources. This definition was originally adopted and utilized in negotiating and awarding AFAs, under Title III, P.L. 93-638, as amended, and is being consistently applied to Title I contracts as authorized under P.L. 93-638, as amended. This term does not refer to an awardee's equitable share of a service unit or program base, which may also be included in a negotiated funding agreement.

Section 5. PROCESS.

(A) Determining Amounts of Startup, Direct, and Indirect CSCs.

(1) Overview. Sections 106(a)(1) and 106(a)(2) and (a)(3) of the ISDEAA provide for funding of Indian Self-Determination awards for program costs and CSC respectively.

Section 106(a)(1) provides that:

> *The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof including supportive administrative functions that are otherwise contractible, is operated.*

In addition, Section 106(a)(2) provides that:

> *There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the*

contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his [her] direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract

And finally, Section 106(a)(3) provides that:

(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under section 106(a)(1).

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option

to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(2) Determining CSC Requirements. Throughout the operation of the program by the awardee, total contract costs (including CSCs) are eligible to be paid as either direct or indirect costs. Since tribes often operate more than one program, many of the costs incurred by the awardee are paid through an indirect cost allocation process, usually negotiated by the "cognizant Federal agency" as identified under the applicable Office of Management and Budget (OMB) Circular. The procedures below are intended to ensure that CSC requirements are accurately identified while avoiding any duplication of funding between CSCs and PFSA funding amounts.

Section 106(a)(3) authorizes awardees to be paid CSC costs, whether they are "indirect" in nature (benefiting multiple programs) or are additional costs associated with operating a single program, except that such funding shall not duplicate any funding provided under section 106(a)(1).

To ensure that there is no duplication of 106(a)(1) costs in the CSC amounts, the IHS will review the CSC request to identify any costs that are duplicative of the amounts that have been incurred by

the IHS in the operation of the program and included in the 106(a)(1) program funding to be transferred. When the PFSAs to be contracted has not previously been operated by the IHS, the identification of the duplicative costs will be negotiated based on the program budget submitted by the awardee and a budget from the IHS reflecting the expenditure patterns of how the Secretary would have otherwise operated the PFSAs.

For awardees with IDC rates, the IDC agreement and proposal will be analyzed and costs will be considered duplicative if the amounts historically utilized for specific categorical purposes under 106(a)(1) are duplicated in the IDC pool.

When duplicative costs are determined and agreed to between the awardee and the agency, these amounts will be deducted from the negotiated CSC requirement. This adjusted CSC requirement is the 106(a)(2) amount that the awardee is eligible to receive subject to available appropriations.

(a) Startup and Pre-Award Costs. Sections 106(a)(5) and 106(a)(6) of the ISDEAA states:

(a)(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a

one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management."

(a)(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which the costs are incurred.

Examples of startup and pre-award costs include, but are not limited to:

- Purchase of administrative computer hardware and software;
- Required training and staff development;
- Systems development (establishing required administrative and other health management systems); and
- Equipment and furniture to support the administrative unit.

Review of pre-award and startup costs should ensure that there is no duplication with any costs funded under a Tribal Management Grant, when appropriate.

(b) Direct CSC. Direct contract support costs (DCSC) pay for activities that are not contained in either the IDC pool (or indirect type cost budget) or

the amount computed pursuant to section 106(a)(1). DCSC amounts are awarded on a recurring basis.

Examples may include, but are not limited to:

- Unemployment taxes on direct program salaries;
- Workers compensation insurance on direct program salaries;
- Cost of retirement for converted Civil Service and Commission Corp salaries;
- Insurance;
- Facilities support costs to the extent not already made available;
- Training required to maintain certification of direct program personnel; and
- Any other item of cost that meets the definition of CSC at section 106(a)(2) but is not included in the awardee's IDC pool or the 106(a)(1) amount.

DCSC funds are provided to the awardee on a recurring basis and need not be rejustified each year. In accordance with section 106(a)(3)(b) of the ISDEAA, however, the amount of funds needed for DCSC may be renegotiated on an annual basis at the option of the awardee. To the extent that a greater amount of DCSC need is agreed to, that additional requirement will be recognized as CSC shortfall and will be considered for funding under Pool No. 3 [see section 5(B)(3) below]. To the extent that the DCSC requirement is reduced, excess DCSC funds may first be used to fully fund the awardees

IDC requirements before the IHS reduces any excess funds.

Startup costs and DCSCs must be justified as such and negotiated with the Area Office before recommendation to the IHS Headquarters, Division of Financial Management (DFM). Items not included as examples above, but requested and justified by awardees, shall be submitted by the Area office to Headquarters, DFM, for review. This will contribute to greater consistency from Area to Area (see also Roles and Responsibilities, paragraph 5(C) below).

(c) Indirect Costs. Guidelines for the Principles Involved in Negotiating Indirect and Indirect Type Costs: A plan for allocation of IDCs will be required to support the distribution of any IDC related to the awardee's program. All IDC included in the plan will need to be supported by accounting records that will substantiate the propriety of the indirect costs. The allocation plan should cover all IDC of the awardee, and contain, but not necessarily be limited to, the nature and extent of services provided and their relevance to the awardee's program, the item of expense to be included in the IDC pool, and the methods to be used in distributing costs.

Various OMB Circulars establish principles and standards for determining IDC applicable to the awardee. Section 106(j) of P.L. 93-638, as amended, has made modifications to the OMB cost principles otherwise applicable to awardees.

In determining the amount of CSC required, Areas should review the awardee's cost allocation

plan and its associated IDC proposal and approved IDC negotiation agreement.

(i) Awardees With Negotiated IDC Rates. The amount of IDC expected to be incurred by awardees utilizing rates negotiated with the cognizant Federal agency, will be determined by applying the negotiated rate(s) to the appropriate direct cost base amount subject to special provisions relating to any tribal shares included in the direct cost base, as explained in paragraph 5(A)(3) below. The amount determined as the awardee's CSC requirement will be consistent with the individual awardee's rate agreement, reflecting any exclusions required by the IDC agreement.

(ii) Awardees Without Negotiated IDC Rates (Guidelines for Agency Negotiators). A lump sum amount for "indirect types of costs" may be computed for awardees that do not have formally negotiated agreements with their cognizant Federal agency for reimbursement under an IDC rate. This annual lump sum amount may be calculated by negotiating a fixed amount for "indirect types of costs." Categories of costs often considered "overhead" or "indirect type" are generally in the categories of Management and Administration, Facilities and Equipment, and General Services and Expenses.

Examples of indirect or indirect type costs are:

Management and Administration	Facilities and Facilities Equipment	General Services and Expenses
Governing Body	Building Rent/Lease/Cost Recovery	Insurance and Bonding
Management and Planning	Utilities	Legal Services
Financial Management	Housekeeping/Janitorial	Audit
Personnel Management	Building and Grounds	General Support Services
Property Management	Repairs and Maintenance	Interest
Records Management	Equipment	Depreciation/Use Fees
Data Processing		
Office Services		

(3) Alternative Methods for Calculating CSC Associated With "Tribal Shares." If an awardee's contract includes tribal shares, the awardee shall elect the method for determining the CSC associated with those tribal shares in one of two ways.

(a) Alternative A. The awardee and the Area Office shall conduct a case-by-case detailed analysis of the "purpose for which the [tribal share] funds were utilized by the Secretary." Tribal shares will be reviewed to identify types of costs that are duplicative of those costs that are already included in the awardee's IDC pool or are proposed to be funded as DCSC. Those costs that are already in the awardee's IDC pool or DCSC budget will be considered as duplicative of the tribal shares for purposes of funding IDC for administrative or "overhead" purposes [Section 106(a)(3)(A)(ii)].

In determining whether such costs are duplicative, the review will consider both the cost category labels (travel, supplies, etc.) and how the funds were spent by the IHS.

(b) Alternative B. The awardee and the Area Office will apply the following "split" of total tribal shares: Eighty percent of the tribal shares amounts will be considered as part of the awardee's direct program base [section 106(a)(3)(A)(i)] and 20 percent of the tribal share amounts will be retained by the awardee to be considered as available funding for administrative or "overhead" purposes [section 106(a)(3)(A)(ii)].

(c) If the amount set aside for CSC requirements (20%) exceeds the awardee's negotiated CSC requirements, the awardee shall retain these funds for program purposes.

Once these two amounts are computed, they will be used in accordance with the terms of the rate agreement (or alternative method provided herein) for calculating the amount required for CSC. The balance of the tribal shares not considered as part of the direct program base will be considered as available for CSC. Any excess CSC requirements not funded by the portion of the tribal shares considered available for CSC will be eligible for payment as provided herein, and the processes specified in this Circular for allocation of funding in this pool will apply.

Exhibit 99-03-B illustrates how Alternative A (a detailed analysis) would be calculated, and Exhibit 99-03-C illustrates how Alternative B (the "80/20 method") would be calculated.

(B) Allocating Funding Available for CSCs.

In theory, CSC funding is composed of three "pools." The first pool is composed of any funding increase appropriated for CSCs associated with new and expanded awards. The second pool is composed of the total amounts awarded by the IHS in the prior year for direct and indirect CSCs (the prior year's "base"). The third pool is composed of amounts, if any, appropriated for increases on the prior year "base" such as mandatory increases or shortfall funds. Each pool has separate funding priorities and eligibility requirements.

(1) Pool No. 1 – ISD Fund.

(a) The ISD Fund will cover CSC requirements associated with the following awards:

i) An initial transfer of a PFSA previously operated by the IHS to an awardee;

ii) Expansion of a PFSA through the assumption of additional shares of PFSAs previously operated by the IHS, regardless of the organizational level at which the expanded PFSA was operated;

iii) Assumption of programs previously operated under awards to other awardees; or

iv) New or expanded PFSAs available due to new appropriations, excluding mandatory increases.

(b) When an awardee withdraws PFSAs from an existing award between the IHS and another awardee who has been operating that PFSA on

behalf of the first awardee, the existing CSC is subject to reallocation between the two awardees. In the absence of an agreement between the awardees, the existing CSC will be divided as follows:

- DCSC is directly associated with the direct program funds and therefore should be reallocated proportionately between the awardees on the same basis as the direct program funds are being reallocated.
- Conversely, IDC funding should be first applied to the existing awardee up to the full amount that can be justified by that awardee. Excess IDC funds should then be transferred to the new awardee. The new awardee is then eligible for ISD funds to recover whatever additional IDC requirements it has in accordance with the Pool No. 1 allocation process. If IDC funds were not sufficient even for the first awardee, its additional IDC need shall be treated as shortfall and eligible for funding under Pool No. 3. The full IDC requirement of the new awardee should be considered for funding under its ISD request.

(c) Initial Funding Period. New and Expanded Contracts. CSC funds for new and expanded programs will be allocated by IHS Headquarters as expeditiously as possible. To the extent available funding is provided to each CSC request on the ISD list for the current fiscal year, CSC funding requests on the ISD list (known as "ISD requests") will be determined as follows:

(i) First, subject to paragraph 5(c)(iv) below, the initial distribution of the ISD Fund will be

made subsequent to July 3rd of each fiscal year, based on contract proposals being received by July 3rd of the current fiscal year. If the IHS and the tribe have failed to reach an agreement on the amount of the ISD request by the time of the initial distribution of the ISD Fund, an appropriate amount will be identified and reserved for a subsequent distribution.

(ii) Second, ISD requests will be funded by first paying the full startup and pre-award cost requirement negotiated under each ISD request. If the ISD Fund is not sufficient to fully fund the total startup/pre-award costs of all ISD requests negotiated, then the amount available will be proportionately divided against the total negotiated startup and pre-award costs of all negotiated requests.

(iii) Third, the overall CSC requirement of each awardee, excluding startup or pre-award costs, that has an ISD request pending will be computed. The IHS will then allocate greater ISD funding to awardees with the lowest percentage of overall CSC need currently being funded. This process will raise the minimum level of CSC being funded to the maximum percentage possible. See Exhibit 99-03-D for a description and an example of this funding methodology. The ISD payment will not exceed the total amount of the computed ISD request.

NOTE: In the event an awardee does not submit an ISD request in time for the initial distribution of the ISD Fund, there is a risk that an award will not be able to be made within the current fiscal year or that ISD funds will have been fully allocated and no ISD

funds will be available for a subsequent distribution. Requests received after July 3rd that do not receive ISD funds will be considered for funding in the next fiscal year.

(iv) An allocation will be made as expeditiously as is practical, based on all ISD requests received and negotiated. An interim payment in advance of the initial distribution described in paragraph 5(c)(i) above may be made to awardees earlier in the fiscal year if the IHS determines that sufficient funds will be available to fund all expected new and expanded contracts or compacts to at least that same level during the balance of the fiscal year.

(v) If there are no ISD funds to be distributed in the current fiscal year to pay ISD requests, all unfunded requests will be considered a part of the overall CSC shortfall for funding under Pool No. 3 in the current year and will not be considered for ISD funds in the subsequent fiscal year.

(vi) If an awardee proposes to start a new or expanded activity for less than a full year, an annual amount for the ISD requirement will need to be computed consistent with the methodologies included in this Circular. Startup and pre-award costs should be identified at their full amount and all other costs should be prorated to reflect the reduced award period in the first year of the award. When computing the requirement for the subsequent year the IHS shall ensure, to the greatest extent possible, that funds to cover the same proportionate share of the annual ISD

request amount as was paid on the partial year amount, are available for the subsequent year.

(vii) If ISD appropriations are not available to pay all awardees 100% of their ISD requests, the remaining unpaid DCSC and IDC will be recorded as part of the overall CSC shortfall used in the allocation of Pool No. 3.

(viii) If excess ISD funds remain after paying all ISD requests, the remaining ISD funding will be added to Pool No. 3 (to the extent not prohibited by law) and be distributed according to the methodology described in paragraph 5(B)(3) below.

(2) Pool No. 2 – Prior Year CSC Funding That Remains Justified in the Subsequent Fiscal Year (Ongoing Awards).

(a) The amount of CSC funds paid to an Area in any year will be paid to that Area as a recurring amount. Adjustments will only be made in subsequent years as new funds are made available or as Areas return CSC funds that they no longer require.

(b) As stated in paragraph 5(C)(2)(a), DCSC funding is provided on a recurring basis. Mandatory increases provided by Congress on DCSC funding should be added to Pool No. 2 and provided to awardees without further justification.

(c) All indirect CSC funds will be paid to the awardee as non-recurring funds. Each awardee's requirement for indirect CSCs shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. Prior

year funding for an awardee's indirect CSC will not be reduced in subsequent years as long as the CSC funding for indirect CSC in the subsequent year does not exceed 100% of the awardee's total CSC requirement. [See paragraph 5(C)(2)(c) below.]

(d) If CSC funds (direct or indirect) are available within an Area due to reductions in tribal CSC requirements, those funds shall be redistributed to awardees within that Area according to the methodology described in paragraph 5(B)(3) below. Notwithstanding any Area redistribution of CSC, if an awardee's current CSC base is not adequate to meet all of the awardee's CSC requirements, then any shortfalls shall be considered for funding under Pool No. 3 according to the methodology provided in Exhibit 99-03-E.

(3) Pool No. 3 – Mandatory Increases/Shortfall Funds. Prior year funds provided for indirect CSCs to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the ISDA. Awardees should expect to receive these funds continuously, if they continue to justify at least the same or greater annual need. If an awardee's current CSC base is not adequate to meet all of the awardee's CSC requirements, then any shortfalls shall be considered for funding under Pool No. 3 according to the methodology provided in Exhibit 99-03-E. Several sources of revenue may be available to fund these ongoing shortfalls in CSC. These include:

- Funds returned from non-recurring startup funding from the prior year, to the extent that

they are available. (Such funds may not be available under Pool No. 3 if the Director has used the funds to address existing CSC obligations or significant inequities in CSC funding.)

- Funds remaining (if any) from the ISD appropriations after funding the total negotiated ISD requests for the fiscal year, to the extent not prohibited by law.
- Funds appropriated by Congress for mandatory increases on IDC.
- Funds appropriated by Congress for CSC Shortfalls.

Funds received from any of the sources above shall be allocated to contractors in the ongoing Pool No. 3 to reduce their CSC shortfalls according to the methodology provided in Exhibit 99-03-E. The intent of this allocation is to provide Pool No. 3 funding to all awardees in proportion to their overall CSC shortfall.

The distribution of funds from Pool No. 3 shall be made as expeditiously as possible, but no later than March 30th of any fiscal year.

(C) Roles and Responsibilities.

Awardees as well as IHS staff have distinct roles and responsibilities in facilitating the determination of tribal CSC requirements and in the allocation of CSC resources. This subsection will describe those activities associated with the determination of initial tribal CSC (ISD) requirements, those activities associated with ongoing management of CSC requirements, and

some of the ancillary CSC activities carried out by the IHS.

(1) Initial ISD Request Responsibilities.

(a) Initial ISD Request. Awardees will provide a detailed ISD request to the Area Director or his/her designee. Awardees should be encouraged to complete their ISD requests on forms developed by the IHS for that purpose [see Exhibit 99-03-G]. The request must include a clear description of the requested CSC amounts to be negotiated (as specified at 25 C.F.R. Sec. 900.8), the date that the PFSAs are to be assumed, and an identification of the amount of program funding to be transferred. Additionally the awardee is encouraged to provide a detailed line item tribal budget for the 106(a)(1) amount in order to facilitate CSC negotiations. The Area Director or his/her designee will provide a copy of the negotiated ISD request to the IHS Headquarters DFM, and in the case of Title III, to the Office of Tribal Self-Governance.

(b) ISD Negotiation. The Area Office has primary responsibility for negotiating the ISD request with the awardee and forwarding a recommendation to Headquarters DFM for review and approval. Headquarters DFM shall have responsibility to review and approve the request. If Headquarters DFM raises an objection to the request, they shall communicate their objection in writing to the Area Director or his/her designee and request re-negotiation with the awardee. The Headquarters DFM may assist the Area

in this renegotiation. If the Area and the awardee cannot agree on an item(s) of cost, the Area shall issue a (partial) declination of the awardee's contract proposal in accordance with 25 C.F.R. Section 900.20-33. The declination must be issued within 90 days of receipt of the awardee's proposal unless the awardee has provided a written extension in accordance with 25 C.F.R. Section 900.17.

(c) ISD Request List. The list of pending ISD requests for each fiscal year for the ISD Fund will be maintained by the Headquarters DFM and distributed quarterly to the Area Offices and to awardees on the list for the current fiscal year. The list will include the name of the awardee; the proposed start date; the date of request or proposal; an estimated amount of the program costs to be awarded, i.e., the 106(a)(1) amounts; the estimated amount of CSC approved; the estimated percentage of the approved CSC requirement to be awarded; and an estimate of any remaining ISD funds anticipated after subtracting all existing ISD requests. The Headquarters DFM will update the list of estimated amounts of CSCs as additional data becomes available through negotiations. As soon as possible after the appropriation is signed, but not later than the 15th day of the month following the end of each quarter, the IHS will notify all of the awardees with pending ISD requests of the total amount of negotiated ISD requests that are eligible for payment in the initial distribution of ISD funding, and the awardee's calculated proportion of the ISD request, if

any, that can be expected to be paid by the IHS based on ISD requests received to date.

d) Changes in Start Date. Prior to actual startup, any awardee has the right to delay its startup date, if in its sole discretion and absent a declination issued by the IHS, the expected amount of CSC funding to be received by the awardee is insufficient to properly carry out the program. If an awardee makes such an election, the Area Office will contact the awardee in order to acknowledge the change and to determine a new proposed start date. Delay of the startup date to a subsequent fiscal year shall not require an awardee to submit a new or revised CSC proposal, although it may require a revision or renegotiation of the CSC amounts, depending upon the circumstances.

In the alternative, if an awardee believes it cannot operate the PFSAs that it is contracting due to the delay in CSC funding under the initial ISD allocation made after July 3, that tribe may delay its startup date until the initial allocation can be made. At that time the awardee will receive a prorated share of its CSC allocation in accordance with paragraph 5(B)(1)(c)(vi) above. In the subsequent year, the IHS will then be required to provide this same proportionate share of the initial payment, to the greatest extent possible, annualized for the entire fiscal year.

(2) Subsequent Funding Periods.

(a) Beginning in year 2, DCSC requirements will first be funded up to the total amount of the original ISD request for DCSCs. DCSC, along with other section 106(a)(1) funds, will be considered part of the recurring base of the award. Mandatory funding increases will be paid based on congressional appropriations. The amount of the DCSCs is provided to the awardee on a recurring basis and will not be reduced but may be renegotiated annually at the option of the awardee.

(b) IDC funding paid in connection with an ISD request will be transferred to Pool No. 2, the "Ongoing Pool" in year 2. Thereafter it will be paid on a non-recurring basis to the awardee, and will recur in subsequent years to the extent it does not exceed 100% of the awardee's calculated IDC requirement.

(c) In situations where an awardee's IDC rate is reduced, either because a Provisional rate is made final or because a lower subsequent Fixed w/Carry Forward rate is approved, the Area is required to determine if the reduction has resulted in the awardee receiving more IDC funds than is otherwise permissible under the new rate. If available IDC funding exceeds this new IDC requirement, excess IDC funds may first be used by the awardee to fully fund existing DCSC shortfall requirements before the IHS reduces any excess funds. Areas are required to collect excess CSC funds back from awardees for redistribution to other tribal shortfalls within that Area. If the awardee refuses to execute a bilateral modification to

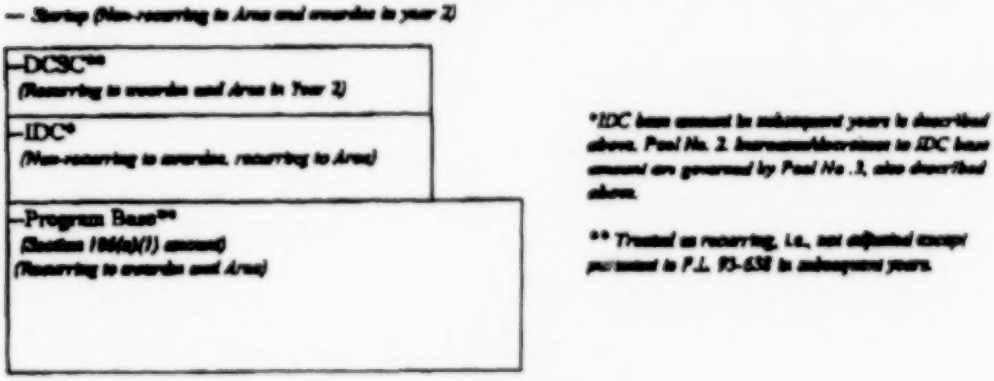
return these funds, then the Area Office is expected to file a claim against the awardee in the amount of the overpayment in accordance with the Contract Disputes Act (P.L. 95-563, as amended, and 25 C.F.R. Section 900.216).

(d) Each Area Director or his/her designee will report to Headquarters DFM any shortfalls in funding of direct or indirect contract support and such shortfalls should be included in the required reports to the Congress and be reported to tribes (see Section 6. below).

(e) Startup funding does not recur to the awardee in year 2. Instead, to the extent available, such funds shall be added to Pool No. 3 in the subsequent year. Startup costs that are not funded in the initial year of the award will not be carried forward and will not be included in subsequent CSC shortfall reports.

- *Note: The IHS has interpreted Section #314 of the fiscal year (FY) 1999 Omnibus Appropriations bill as prohibiting the payment of startup costs for fiscal years prior to FY 1999. As a result of this interpretation, a number of tribes were not paid for startup costs that had been negotiated as a part of an approved ISD request. As a transitional step toward the adoption of this new Circular, the* FY 2000 *IHS CSC Shortfall Report shall include a separate schedule detailing, tribe by tribe, the total amounts of startup costs that were approved but not paid in FY 1999. These amounts will not be included in the FY 2000 CSC Shortfall estimate but will be reflected in the report for the purpose of informing the Congress of startup costs that were not paid due to the passage of Section #314.*

A graphic illustration of CSC is provided as follows:



(3) Other CSC Responsibilities.

(a) Disputes. Disputes over CSC should be handled as either a formal declination appeal or as a Contract Disputes Act (CDA) claim. An informal conference (25 C.F.R. Section 900.153) or other alternative disputes mechanism (25 C.F.R. Section 900.217) may also be useful in resolving disagreements over CSC issues.

When it is unclear whether a dispute should be handled as a declination or a CDA claim, the Director of Self-Determination Services in the IHS Headquarters Office of Tribal Programs should be contacted for possible referral to the IHS Headquarters Leadership Team.

(i) Pre-Award Declination Appeals. Declination appeals might arise out of a pre-award decision to decline a proposal, in whole or in part; a pre-award decision to decline a proposed amendment to an award; or any of the other reasons cited at 25 C.F.R. Subpart L, Section 900.150. Declination appeals are

most likely to occur as a result of disagreements over an awardee's ISD request [Paragraph 5(C)(1)(b) above]. Declination appeals must be processed pursuant to 25 C.F.R. Subpart L, Sections 900.150-177.

(ii) Post-Award Contract Disputes Act Claims. CDA claims arise out of a post-award dispute regarding an awarding official's decision relating to a Self-Determination award. Post-award contract disputes are likely to occur as a result of the parties failing to agree concerning the renegotiation of DCSC [paragraph 5(A)(2)(b) above], the renegotiation of indirect type costs [paragraph 5(A)(2)(c) above], or the allocation of CSC [paragraph 5(B)(2) or (3) above]. Post-award contract disputes must be handled pursuant to 25 C.F.R. Subpart N, Sections 900.215-230.

(b) CSC Pilot Projects and Base Budgets. There are currently several CSC Pilot Projects ongoing (including CSC Base Budgets) that are intended to incorporate innovative approaches to CSC funding issues. Upon completion and evaluation of these projects, this Circular may be amended to incorporate new provisions.

(c) CSC Budget Projections. Each Area Director or his/her designee shall survey tribes and tribal organizations within that Area to develop accurate CSC need projections on an annual basis. This will include an identification of amounts required for the ISD Fund and projections for the total ongoing CSC requirement for the following fiscal year

as well as estimates for the next two fiscal years. This information will be consolidated by the Headquarters DFM and provided to tribes and tribal organizations. This information will also be generated in a report on or before September 30th of each fiscal year and will be used by the IHS in conjunction with the agency's budget formulation process.

(d) IHS CSC Workgroup. From time to time the IHS will convene a workgroup of Federal and tribal individuals who possess an extensive knowledge of CSC issues. This workgroup has historically provided advice and guidance to the IHS in the development of agency CSC policy and in the ongoing management of CSC. The workgroup is not a substitute for tribal consultation but will continue to be used in an advisory capacity for the benefit of both tribes and the IHS.

Section 6. IHS CSC SHORTFALL REPORT.

(A) Requirements for Reporting and Documenting Amounts of CSC Available, Needed, and Requested. Areas shall maintain a historical record of funds negotiated and awarded in each of the categories listed below. A detailed sample of the data base to be maintained by each Area is provided in Exhibit 99-03-F.

- Direct program funds;
- Startup costs;
- Direct contract support funds;
- Indirect cost funding;
- Indirect-type cost funding;

- Indirect cost rates;
- Types of bases;
- Pass through/exclusions;
- Total IDC Base (direct cost base)
- Direct CSC requirements
- Indirect CSC requirements

(B) Areas shall provide a report to the Headquarters DFM by November 15th of each fiscal year that includes those data elements identified above for the previous fiscal year ended September 30. Before the report is submitted, the amounts included in the report shall be certified as accurate by the Area Finance Management Officer (FMO) and the Area Director or his/her designee.

(C) A copy of the Area's data shall be provided by the Area Director or his/her designee to the awardees within that Area by November 15th as well. Any corrections or changes to the data resulting from awardee review must be certified by the Area FMO and submitted to the Headquarters DFM through the Area Director or his/her designee by December 15th of each fiscal year.

(D) The Headquarters DFM shall consolidate all Area reports into the *IHS CSC Shortfall Report*. In doing so, the Headquarters DFM shall, in consultation with the Office of Tribal Programs and the Office of Tribal Self-Governance, provide a projection of the CSC shortfall for the current and subsequent fiscal year.

(E) The Headquarters DFM shall finalize the *IHS CSC Shortfall Report;* obtain concurrence from the Director, Office of Tribal Programs, and the Director, Office of Tribal Self-Governance; and then send it to the Director, IHS, for approval by February 1st of each fiscal year.

(F) After the report is approved by the Director, IHS, the Headquarters DFM will provide copies to each Area Director or his/her designee, who shall then be responsible for providing a copy of the report to all awardees compacting or contracting within that Area.

Section 7. SUPERSEDURE.

Indian Health Service Circular No. 96-04, "Contract Support Costs," dated April 12, 1996, and any policies or instructions previously issued regarding the allocation of CSC funds, are hereby superseded.

Section 8. EFFECTIVE DATE.

The policy and procedures contained in this Circular are effective upon signature by the Director, IHS.

/s/ Michael H. Trujillo
Michael H. Trujillo, M.D., M.P.H., M.S.
Assistant Surgeon General
Director, Indian Health Service

Circular Exhibit 99-03-A

Indian Self-Determination and Education and Assistance Act

Public Law 93-638, As Amended
Section 106: [Contract Funding] [25 USC Sec. 450j-1]

SEC. 106 [25 USC 450j-1]. (a)(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this

Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection 106(a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 8.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) The amount of funds required by subsection (a)—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105(c)[450j(c)].

Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

(c)(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not

form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(d) Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(e) Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force prior to enactment of Chapter 75 of title 31, United States Code, any other required final audit report. Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 110 [450m-1]. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31, United States Code, or noncompliance with any other applicable law.

Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 16 of the Indian Reorganization Act of June 18, 1934 (25 USC 476, 48 Stat. 984).

(f) Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(g) In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(h) On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(i) Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(j) Without intending any limitation, a tribal organization may, without the approval of the

Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building

renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this Act.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(k)(1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for

suspending, withholding, or delaying payment of funds.

(1) The program income earned by a tribal organization in the course of carrying out a self-determination contract-

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(m) To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a), the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(n) Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

Circular Exhibit 99-03-B

CSC Calculation
Based on a Detailed Analysis

Assumptions:

1. Tribe B has $100,000 in Area and HQs tribal shares
2. Detailed analysis indicates that $10,000 of tribal shares is similar in nature to costs included in tribe B's indirect cost pool
3. Indirect cost rate = 30%
4. New budgeted tribal wages = $48,000
5. DCSC fringe = XX % of new wages
6. Other DCSC = $5,000
7. No excluded items

Expanded program base $100,000-$10,000	$90,000
DCSC fringe $48,000 x XX %	$7,200
Other DCSC	$5,000
Sub-total direct	$102,200
Less excluded items	$0
Total direct base	$102,200
X 30% indirect cost rate	$30,660
Total direct and indirect	$132,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$30,660
TOTAL CSC	$42,860
Less tribal shares available for CSC	$(10,000)
TOTAL ISD request	$32,860

Tribe B would receive $100,000 from tribal shares and $32,860 would be requested from the ISD Fund.

Circular Exhibit 99-03-C

CSC Calculated Using the 80/20 Method [2]

Assumptions:

1. Tribe A has $100,000 in Area and Headquarters Tribal Shares
2. Indirect cost rate = 30%
3. New budgeted tribal wages = $48,000
4. DCSC fringe = XX % of new wages
5. No excluded items
6. Other DCSC = $5,000

Expanded program base $100,000 tribal shares x 80%	$80,000
DCSC fringe $48,000 wages x XX %	$7,200
Other DCSC	$5,000
Sub-total direct	$92,200
Less excluded items	$0
Total direct	$92,200
x 30% indirect cost rate	$27,660
TOTAL direct and indirect	$119,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$27,660
TOTAL CSC	$39,860
Less tribal shares available for CSC	$(20,000)
Total ISD request	$19,860

Tribe A would receive $100,000 from tribal shares and $19,860 would be requested from the ISD Fund.

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[2] The 80/20 Method was developed as a result of a joint Tribal/IHS cost study. The percentages used will not be changed until a subsequent cost study is completed, tribal consultation is undertaken, and this Circular is revised.

Circular Exhibit 99-03-D

Allocation of ISD Funds Against CSC Requirements For New and Expanded Awards (Bottom-Up Approach)

The purpose of the allocation of funding needed for new and expanded P.L. 93-638 compacts and contracts is to provide an equitable allocation of available resources and in doing so, to consider the overall level of CSC need currently being funded for each awardee eligible for ISD funding. Allocation of ISD funding by this methodology is intended to decrease variations in overall CSC shortfall percentages among awardees by directing ISD funds to those awardees having the lowest percentage of overall CSC need currently being funded.

ISD funds will be paid according to the following methodology:

(1) The CSC requirement to fund a new or expanded contract will be negotiated according to the guidance provided in paragraphs 5(A)(1) - (3) of this Circular.

(2) The full startup and pre-award cost need negotiated with the awardee for all requests received prior to July 3rd of the fiscal year will first be fully funded. If the ISD Fund is not sufficient to fully fund the total startup/pre-award costs of all ISD requests negotiated, then the amount available in the ISD Fund will be proportionately divided against the total negotiated startup and pre-award costs of all negotiated requests.

(3) After funding startup and pre-award costs, the total amount of ongoing CSC requirements is

computed from the data provided in Section 6 of this Circular *(IHS CSC Shortfall Report)*, taking into account any CSC shortfall funding provided to the awardee through the allocation of Pool No. 3.

(4) For each awardee having an ISD request for the current fiscal year that was submitted prior to July 3rd the awardee's total overall CSC requirement (less startup and pre-award costs already paid) is computed including both the CSC requirements associated with the ongoing program and the ISD request.

(5) The percentage of CSC available for each awardee, is computed by dividing the amount already available to the awardee for CSC funding, by the total CSC requirement computed in paragraph four (4) above (that is, before the award of any direct or indirect cost funding for the ISD allocation).

(6) A CSC percentage "floor" is computed for purposes of paying awardees with ISD requests in the current year. The CSC floor is the lowest percentage of total CSC need to be funded for each awardee having an ISD request. The floor is set at the highest common level of CSC that can be funded given the total ISD funds available.

(7) For all awardees with a current CSC requirement that is below the CSC floor, an ISD payment will be computed that brings the awardee to the CSC floor. This will be determined by multiplying the floor percentage by the entire CSC requirement of the awardee and subtracting the current CSC funding for the awardee.

(8) Although the amount required by an awardee to reach the CSC floor may exceed the awardees ISD request, the amount funded from Pool No. 1 will be limited to the awardees ISD request.

(9) Any shortfall remaining for an ISD awardee will be paid pursuant to Pool No. 3, along with all other awardees having such shortfalls, to the extent funds are available for ongoing CSC shortfalls, in accordance with Exhibit 99-03-E.

(10) If ISD funding is sufficient to fully fund all ISD requests, 100% of the requests will be paid but no additional ISD funding will be provided from the ISD Fund to pay shortfalls associated with ongoing programs.

The allocation methodology for all awardees with ISD requests for new and expanded contracts can be describes mathematically as:

$ISDF_a = (ACSC_a * \%CSC_{funded}) - ACSC_a$

Where:

$ISDF_a$ = This is the amount of *new CSC funding* to be paid to an awardee on its ISD request. This amount is limited to the total amount of the ISD request.

$ACSC_a$ = The awardee's total CSC *requirement* (including the total ISD requirement in the current year)

$\%CSC_{funding}$ = The highest of either:

- The existing % of CSC *funding* (including the total ISD requirement in the current year), or
- The highest level CSC support that can be obtained for all the awardees in the ISD pool for the current year (i.e., the "floor").

$ACSC_a$ = The total CSC funding currently *available* in the contract or compact (inclusive of any distribution from Pool No. 3).

A sample of this allocation methodology is provided below.

The following sample assumes that eight tribes have approved ISD Fund requests for the fiscal year totaling $7,500,000 after the payment of their startup and pre-award costs and the ISD appropriation still had a balance of $5,000,000 remaining.

All but one of the awardees on the list would receive some funding for their ISD request for the fiscal year. The single tribe that received no funding in the group would not lose any existing funds and thus would remain at 87% funded for CSC, the highest funding in the group. All of the remaining awardees would receive some ISD funding and would be funded, after ISD funding, at 84.96% of total need which is the highest % of need which could be reached with the appropriated dollars available except that funding for tribes 4 and 8 would not reach the floor since their requirements exceed the "cap" established by the amount of their ISD request.

Computation of ISD payment for Sample Fiscal Year

Tribe	CSC Need	% need before ISD	CSC Funding	Negotiated ISD Request	Total Need After ISD Request	% need W/O ISD Payment	ISD Payment	Total CSC after ISD	ISD Payment
Tribe 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tribe 2	0	[illegible]	0	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tribe 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tribe 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tribe 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tribe 6	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Tribe 7	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	0
Tribe 8	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
	[illegible]	n/a	[illegible]	[illegible]	[illegible]	n/a	n/a	[illegible]	[illegible]
	Break point %		[illegible]						
	ISD appropriation		[illegible]						

Circular Exhibit 99-03-E

Allocation of Pool No. 3 Funds Against Overall CSC Shortfall for Ongoing Contracts (Weighted Need Allocation)

The purpose of this allocation of funding needed for all P.L. 93-638 compacts and contracts is to provide for an equitable allocation of available appropriated resources when considering the overall level of CSC need currently being funded each awardee eligible for increased CSC funding. Allocation of Pool No. 3 funding by this methodology will:

- *Provide some increases to all P.L. 93-638 contractors and compactors which have a CSC shortfall, and*
- *Provide relatively larger increases to those with the greatest shortfalls thus decreasing variations in overall CSC shortfall percentages among all awardees by providing larger payments to those with the lowest percentage of overall CSC need funded, while at the same time moving all awardees closer to 100% funding.*

The allocation will be done according to the following methodology:

(1) As soon as possible in the fiscal year, but not later than March 30th the amount of the ongoing CSC requirements will be computed from the data provided in Section 6 of this Circular *(IHS CSC Shortfall Report)*.

(2) The percentage of CSC funding available for paying CSC shortfalls is computed by dividing the total funding available for CSC shortfall by the requirement for ongoing CSC shortfall identified above.

(3) The entire amount available for Pool No. 3 is allocated to all awardees with a shortfall in proportion to the size of the ongoing shortfall for each awardee. This is done by multiplying the percentage computed in paragraph three (3) by the ongoing CSC shortfall for each awardee.

The allocation methodology for any awardee can be described mathematically as follows:

$$F_s = (ACSC_r - ACSC_a) * (Pool\ 3 / (TCSC_r - TCSC_a))$$

Where:

F_s = New CSC shortfall funding to be received for any awardee

$ACSC_r$ = Total ongoing CSC requirement for the awardee

$ACSC_a$ = Total CSC funding available for the awardee

$TCSC_r$ = Total ongoing CSC requirement for all awardees

$TCSC_a$ = Total CSC funding available for all awardees

A sample of this allocation methodology is provided below.

The following sample assumes that eight awardees have approved total CSC requirements ($TCSC_r$) for the fiscal year totaling $41,000,000. The total CSC shortfall ($TCSC_S$) for the eight awardees is $9,459,500 and the total CSC funding available ($TCSC_a$) for CSC shortfalls under Pool No. 3 is $5,000,000.

All of the awardees on the list would receive some funding for their CSC shortfalls for the fiscal year. Each awardee would receive funds in proportion to the existing shortfall of the awardee. The proportion of the total CSC fundable would be determined by dividing

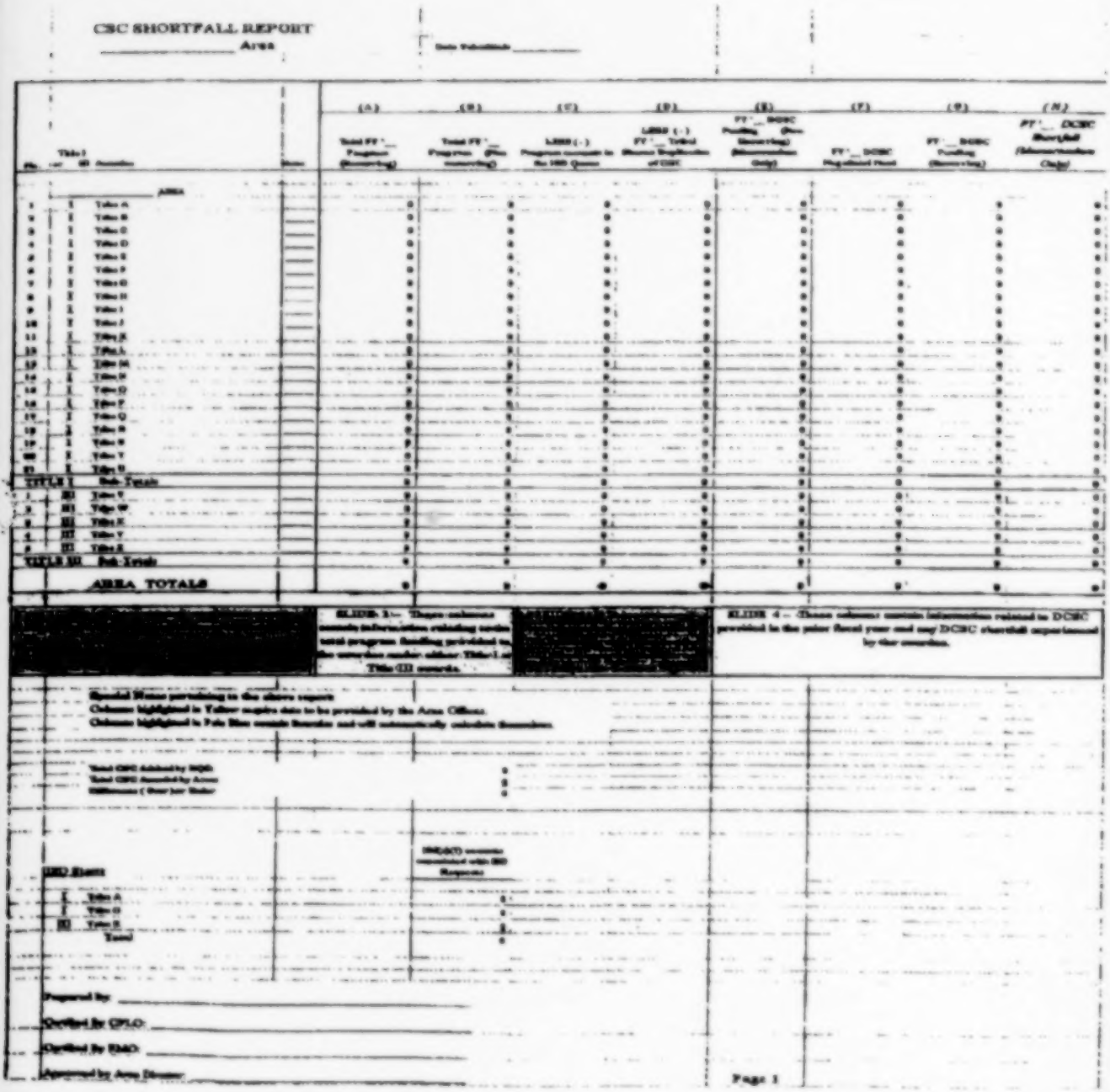
the total CSC available (TCSC or $5,000,000) by the total CSC shortfall (TCSC$_s$ or $9,459,500) or 53%. The shortfall for each awardee would be funded at 53%.

After the shortfall allocation the range of funded shortfall for all awardees in the group narrows to between 65% and 99%.

Computation of CSC Shortfall Payments For Sample Fiscal Year

Tribe	CSC Need	% Need Funded	CSC Funding	CSC Shortfall	Shortfall Payment	Total CSC After Shortfall	% Need Funded after ISD Payment
Tribe 1	5,000,000	98%	4,800,000	100,000	52,857	4,852,857	99%
Tribe 2	1,000,000	25%	250,000	750,000	396,427	646,427	65%
Tribe 3	500,000	58%	288,000	212,000	112,057	400,057	80%
Tribe 4	4,000,000	82%	3,280,000	720,000	380,570	3,660,570	92%
Tribe 5	12,500,000	82%	10,232,500	2,267,500	1,198,531	11,431,031	91%
Tribe 6	7,000,000	74%	5,160,000	1,840,000	972,567	6,132,567	88%
Tribe 7	5,000,000	78%	3,880,000	1,120,000	591,997	4,471,997	89%
Tribe 8	8,000,000	59%	3,550,000	2,450,000	1,294,994	4,844,994	61%
Totals	41,000,000	77%	31,540,500	9,459,500	5,000,000	36,540,500	

Circular Exhibit 99-03-F
CSC Shortfall Report Format



CSC SHORTFALL REPORT

_____ Area

Date Submitted _____

			(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	Title	Area	Total FY '__ Program (Recurring)	Total FY '__ Program (Non-recurring)	LESS (-) Program amounts in the 100 Queue	LESS (-) FY '__ Tribal Shares Duplication of CSC	FY '__ DCSC Funding (Non-recurring) (Memorandum Only)	FY '__ DCSC Requirement Need	FY '__ DCSC Funding (Recurring)	FY '__ DCSC Shortfall (Memorandum Only)
		ABRA								
1	I	Tribe A	0	0	0	0	0	0	0	0
2	I	Tribe B	0	0	0	0	0	0	0	0
3	I	Tribe C	0	0	0	0	0	0	0	0
4	I	Tribe D	0	0	0	0	0	0	0	0
5	I	Tribe E	0	0	0	0	0	0	0	0
6	I	Tribe F	0	0	0	0	0	0	0	0
7	I	Tribe G	0	0	0	0	0	0	0	0
8	I	Tribe H	0	0	0	0	0	0	0	0
9	I	Tribe I	0	0	0	0	0	0	0	0
10	I	Tribe J	0	0	0	0	0	0	0	0
11	I	Tribe K	0	0	0	0	0	0	0	0
12	I	Tribe L	0	0	0	0	0	0	0	0
13	I	Tribe M	0	0	0	0	0	0	0	0
14	I	Tribe N	0	0	0	0	0	0	0	0
15	I	Tribe O	0	0	0	0	0	0	0	0
16	I	Tribe P	0	0	0	0	0	0	0	0
17	I	Tribe Q	0	0	0	0	0	0	0	0
18	I	Tribe R	0	0	0	0	0	0	0	0
19	I	Tribe S	0	0	0	0	0	0	0	0
20	I	Tribe T	0	0	0	0	0	0	0	0
21	I	Tribe U	0	0	0	0	0	0	0	0
TITLE I		Sub-Totals	0	0	0	0	0	0	0	0
1	III	Tribe V	0	0	0	0	0	0	0	0
2	III	Tribe W	0	0	0	0	0	0	0	0
3	III	Tribe X	0	0	0	0	0	0	0	0
4	III	Tribe Y	0	0	0	0	0	0	0	0
5	III	Tribe Z	0	0	0	0	0	0	0	0
TITLE III		Sub-Totals	0	0	0	0	0	0	0	0
		ABRA TOTALS	0	0	0	0	0	0	0	0

[redacted]

[redacted]

Special Notes pertaining to the above report:

Columns highlighted in Yellow require data to be provided by the Area Offices.

Columns highlighted in Pale Blue contain formulas and will automatically calculate themselves.

Total CSC Allotted by HQS 0

Total CSC Awarded by Area 0

Differences (Over/(or Under) 0

[redacted] records reconciled with HQ Reports

HQ Sheet

I Tribe A 0

I Tribe O 0

III Tribe S 0

Total 0

Prepared by: _____

Verified by CFLO: _____

Verified by IHAO: _____

Approved by Area Director: _____

Page 1

Circular Exhibit 99-03-F
CSC Shortfall Report Format
(Continued)

CSC SHORTFALL REPORT

Area

(J)	(K)	(L)	(M)	(N)	(O)	(P)	(P)	(Q)	(R)	(S)	(T)
FY'__ Program Base (Ongoing Awards Only)	LESS (-) Other Deductions and Pass-thru	FS Direct Cost Base	Base increase/ decrease - IDC Rate	Fiscal Year & Type of IDC Rate	FY'__ IDC Need (Base+increase)	FY'__ IDC Funding Path	FY'__ IDC Shortfall (Deobligation Only)	TOTAL CSC Need	TOTAL Funding Available for CSC	Total CSC Shortfall	% of Ongoing CSC Need Funded
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	New Budget	FY____	#VALUE!	0	#VALUE!	#VALUE!	0	#VALUE!	#VALUE!
0	0	0	00.00%	FY____	#VALUE!	0	#VALUE!	#VALUE!	0	#VALUE!	#VALUE!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0			#VALUE!	0	#VALUE!	#VALUE!	0	#VALUE!	#VALUE!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0	0000%	FY____	0	0	0	0	0	0	#DIV/0!
0	0	0			0	0	0	0	0	0	#DIV/0!
0	0	0			#VALUE!	0	#VALUE!	#VALUE!	0	#VALUE!	#VALUE!

[redacted] (L)(M) - These columns provide information identifying the awardee, IDC Rates and their applicable fiscal years of those rates or IDC Types negotiated. [redacted] (S)(T) - These columns provide summary information relating to the awardee's total CSC need/funding, shortfall, and percentage of CSC need funded.

Page 1

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Circular Exhibit 99-03-F
CSC Shortfall Report Format
(Continued)

Fiscal Year CSC Shortfall Report

Legend:

(A) = This is the total recurring "program funding" provided to the Contractor or Compactor (Awardee) for the previous fiscal year.

(B) = This is the total NON-recurring "program funding" provided to the Awardee for the previous fiscal year.

(C) = Identify program amounts reported in columns (A) or (B) that are associated with IHS requests currently pending on the IHS Request List. This is the total 106(a)(1) amount identified as a basis for IHS the requests listed in column (U) above.

(D) = Identify Area and HQ Tribal shares available in the previous fiscal year that were duplicative of CSC. This would be the 30% set-aside which has been identified as available for CSC as a part of the 80/20 split in many IHS/CSC negotiations.

(E) = Identify Non-recurring DCSC (Startup cost) funding provided to Awardees who received funding from the IHS Fund for the previous fiscal year.

(F) = Identify Total Direct CSC need negotiated with the Awardee for the previous fiscal year.

(G) = Identify Direct CSC funding actually provided to the Awardee for the previous fiscal year. This is the amount of CSC funds actually paid to the Awardee for DCSC needs on a recurring basis. Be sure to include recurring DCSC provided in the previous fiscal year's IHS payments.

(H) = This is the total DCSC Shortfall for the Awardee. This amount is calculated by subtracting column (G) from column (F).

(I) = This is the gross (total) direct program against which the tribe's IDC need is calculated. Column (A) plus (B) plus (C) minus columns (C) and (D).

(J) = This column includes all other exclusions from the direct program base which are necessary before application of the Awardee's most current IDC rate to the Tribe's direct program base. This generally includes equipment, capital expenditures and major sub-contract amounts. For Awardees with rates based on "salaries only", this will include all non-salary program costs.

(K) = This is the "direct cost base" against which the Awardee's IDC rate is applied in order to yield the IDC need identified in column (N).

(L) = This is Awardee's most current approved IDC rate and type of rate. For Awardee's with one rate, indicate "IDC Type Costs" in this column. (TDC-FT = Total Direct Costs less Pass-Thru, TDC = Total Direct Costs including all pass-thru, Sal = Salaries only, S & W = Salaries & Wages, IDCT = IDC Type Costs, BB = Base Budgets)

(M) = For informational purposes, this is the fiscal year assigned to the rate identified in column (L).

(N) = This is the full previous fiscal year's IDC need calculated for the Awardee based on application of it's most current IDC rate from column (L) to the appropriate direct program base shown in column (K).

(O) = This is the total IDC funding provided to the Awardee for the previous fiscal year.

(P) = This is the total Indirect cost Shortfall for the Awardee. This amount is calculated by subtracting column (O) from column (N).

(Q) = This is the total CSC Need of the Awardee associated with it's ongoing programs in the previous fiscal year, column (O) plus column (N).

(R) = This is the total CSC funding available to the Awardee associated with the it's ongoing programs from IHS Queue programs in the previous fiscal year, columns (D) plus (G) plus (O).

(S) = This is the total CSC Shortfall associated with the Awardee's ongoing programs in the previous fiscal year, column (Q) minus column (R).

(T) = For informational purposes, this is the percentage of total CSC Need funded in the previous fiscal year, column (R) divided by column (Q).

This Report is due by C.O.B. NOVEMBER 14, . The completed report should be sent to (electronically for an attachment to an e-mail) with a hard copy provided via Express Mail. Please "CC" a copy of the report to the Director, Self-Determination Services both electronically and via Express Mail.

Do not fax the report in unless requested to do so.

Questions regarding the Shortfall Report should be directed to:

Don Medrano	Ron Demeray
HQ Division of Financial Management	Director, Self-Determination Services
Phone: (301) 443-1270	Phone: 301-443-1104
Fax: (301) 594-1973	Fax: (301) 443-4886
E-mail: DMedrano@hqe.ihs.gov	E-mail: RDemeray@hqe.ihs.gov

Page 3

Circular Exhibit 99-03-G
ISD Request Form

DATE

FY ___ Indian Self-Determination Fund Request

Area Office /Tribe (Contractor): _____

Program: _____

Contract No.: _____

Program Start Date: _____ ____ Proposal Date: _____

BUDGET CATEGORIES	Direct Program 1866(X)(1-3)	Direct CSC Recurring	Direct CSC Non-Recurring
Salaries & Wages	$ _____		
Fringe (FICA, Medicare, Insurance)	_____		
Fringe (FUTA, SUTA, W.C., Retirement)		$ _____ 1/	
Supplies: Office	_____		
Supplies: Medical	_____		
Supplies: _____	_____		
Supplies: _____			$ _____
Educational Materials	_____		
Travel	_____		
Insurance		_____	
Postage	_____		
Printing & Duplication	_____		
Communications - Local Service & Equip.	_____		
Communications - Long Distance Only	_____		
Training - General	_____		
Training - Discipline Specific		_____	_____
Equipment Maintenance	_____	2/	
GSA/Private Vehicle Leases	_____		
Space Rent	_____		
Utilities	_____		
Consultants/Contracted Services (under $25000)	_____		_____
Other: _____	_____		
Other: _____		_____	
Other: _____			_____
Sub-Total	$0	$0	$0
Consultants/Contracted Services (over $25000)	_____		_____
Equipment - Program (Pass-Thru)	_____		_____ 3/
Equipment - Administrative (Pass-Thru)	_____		
Other: _____ (Pass-Thru)	_____		
Total Direct Costs:	$0	$0	$0
Indirect Cost Rate = 0.000%	$0	$0	$0

Allocation of Area/HQ Shares (80/20 Formula)

Area Tribal Shares	0
HQ Tribal Shares	0
Total Tribal Shares	0
Tribal Shares available for programs (80%)	0
Tribal Shares available for CSC (20%)	0

TOTALS APPROVED:

Direct Contract Support Costs (Recurring)	$0
Direct Contract Support Costs (Non-recurring)	$0
Indirect Contract Support Costs (Non-recurring) *	$0
SUB - TOTAL:	$0

Recommended: Area Contract Proposal Liaison Officer _____

Area Financial Management Officer _____

Area Director _____

MENOMINEE's CONTRACTOR'S RELEASE
FOR CONTRACT No. 239-96-0030

Fiscal Year '98

CONTRACTOR'S RELEASE
FOR ALL CONTRACTS

Pursuant to the terms of Contract No. 239-96-0030 and in consideration of the sum of four Million, Two Hundred Eighty-seven Thousand, Eight Hundred Thirty-eight Dollars $ 4,287,838.00
(Total of amounts payable)
which has been or is to be paid under the said contract to Menominee Indian Tribe of Wisconsin, Tribal Clinic
P.O. Box 970, Keshena, Wisconsin 54135
(Contractor's name and address)

hereinafter called the Contractor or he assignee, if any, the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA hereinafter called the Government, does release, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

1. Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: None
(If none, so state)

2. Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties arising out of the performance of the said contract, which are not known to the Contractor on the date of the execution of this release and of which the Contractor gives notice in writing to the Contracting Officer within the period specified in the said contract.

3. Claims for reimbursement of costs (other than expenses of the Contractor by reason of his indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of the said contract relating to patents.

(The contract was adjusted above to include unaudited costs in the amount of $ 0 . The contractor agrees, pursuant to the clause in this contract entitled Allowable Cost (for cost reimbursement contracts) or Allowable Cost and Fixed Fee (for CPFF contracts), that the amount of any sustained audit exceptions resulting from any subsequent audit made after final payment will be refunded to the Government.)*

The Contractor further agrees, in connection with patent matters and with claims which are not released as set forth above, that it will comply with all of the provisions of the said contract, including without limitation those provisions relating to notification to the Contracting Officer and assistance in the defense or prosecution of litigation. The Contractor further represents that it has made no inventions other than those already reported to the [illegible] WHEREOF, this release has been executed this 26th day of May, 19 98.

WITNESSES

Agnes L. Caldwell

L. R. Wallace

Menominee Indian Tribe of WI.
(Contractor's name)

BY Betty Jo Wozniak

BETTY JO WOZNIAK
TRIBAL ADMINISTRATOR
(TITLE)

NOTE: If the note of a corporation, witnesses are not required, but the certificate below must be completed.

CERTIFICATE

I, _____, certify that I am the _____ (Officer's name)

of the corporation named as Contractor in the foregoing release; that _____ who signed said release on behalf of the Contractor was then _____ (Official title) of said corporation; that said release was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(CORPORATE SEAL)

* Applicable to contracts where unaudited costs claimed by the Contractor are less than $100,000.

FHS-6096
REV. 3-76

CONTRACTOR'S RELEASE
FOR ALL CONTRACTS

Fiscal Year '97

INSTRUCTIONS TO CONTRACTOR: Submit Original and 3 copies. All submitted copies must have original handwritten signatures.

Pursuant to the terms of Contract No. 239-96-0030 and in consideration of the sum of Four Million, One Hundred-nine Thousand, Seven Hundred Sixty-four & 00/100 Dollars ($ 4,109,764.00)
(Total of amounts paid and payable) Menominee-Indian Tribe of Wisconsin, Tribal Clinic
which has been or is to be paid under the said contract to P.O. Box 970, Keshena, Wisconsin 54135
(Contractor's name and address)

hereinafter called the Contractor or to its assignee, if any, the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA hereinafter called the Government, does release, acquit, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

1. Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: None
(If none, so state)

2. Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties arising out of the performance of the said contract, which are not known to the Contractor on the date of the execution of this release and of which the Contractor gives notice in writing to the Contracting Officer within the period specified in the said contract.

3. Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability, including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of the said contract relating to patents.

(The contract sum stipulated above includes unsettled costs in the amount of $ 0 . The contractor agrees, pursuant to the clause in this contract entitled Allowable Cost (for cost reimbursement contracts) or Allowable Cost and Fixed Fee (for CPFF contracts), that the amount of any unsalved audit exceptions resulting from any subsequent audit made after final payment will be refunded to the Government.)*

The Contractor further agrees, in connection with patent matters and with claims which are not released as set forth above, that it will comply with all of the provisions of the said contract, including without limitation those provisions relating to notification to the Contracting Officer and assistance to the Government in the defense or prosecution of litigation. The Contractor further represents that it has made no assignments other than those already reported to the Government in connection with this contract.

IN WITNESS WHEREOF, this release has been executed this _____ day of _____, 19____.

WITNESSES: _____
(Contractor or Corporate name)

_____ BY _____

_____ TITLE _____

NOTE: In the case of a corporation, witnesses are not required, but the certificate below must be completed.

CERTIFICATE

I, _____, certify that I am the _____ (Official title) of the corporation named as Contractor in the foregoing release; that _____ who signed said release on behalf of the Contractor was then _____ (Official title) of said corporation; that said release was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(CORPORATE SEAL)

*Applicable to contracts where unsettled costs claimed by the contractor are less than $100,000.

Prescribed
Rev. 3-76

CONTRACTOR'S RELEASE
FOR ALL CONTRACTS

Fiscal Year '96

INSTRUCTIONS TO CONTRACTOR: Please Original and 2 copies. All executed copies must have original handwritten signatures.

Pursuant to the terms of Contract No. 239-96-0030 and in consideration of the sum of
ur Million Seven Hundred Thirty-one Thousand, Five Hundred Nine & 00/100 Dollars $ 4,731,509.00
Total of amounts unpaid and payable
which has been or is to be paid under the said contract to Menominee Indian Tribe of Wisconsin, Tribal Clinic
P.O. Box 970, Keshena, Wisconsin 54135
Contractor's name and address

hereinafter called the Contractor or to its assignees, if any, the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA hereinafter called the Government, does release, relase, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

1. Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: None
If none so state

2. Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties arising out of the performance of the said contract, which are not known to the Contractor on the date of the execution of this release and of which the Contractor gives notice in writing to the Contracting Officer within the period specified in the said contract.

3. Claims for reimbursement of costs (other than expenses of the Contractor by reason of his indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of the said contract relating to patents.

(The contract cost stipulated above includes unsettled costs in the amount of $ 0 . The contractor agrees, pursuant to the clause in this contract entitled Allowable Cost (for cost reimbursement contracts) or Allowable Cost and Fixed Fee (for CPFF contracts), that the amount of any sustained audit exceptions resulting from any subsequent audit made after final payment will be refunded to the Government.)*

The Contractor further agrees, in connection with patent matters and with claims which are not released as set forth above, that it will comply with all of the provisions of the said contract, including without limitation those provisions relating to notification to the Contracting Officer and refund to the defense or prosecution of litigation. The Contractor further represents that it has made no assertions other than those already reported to the Contracting Officer.

IN WITNESS WHEREOF, this release has been executed this _____ day of _____, 19____.

WITNESSES

_____
Contractor or Corporate name

_____ BY _____

_____ TITLE _____

NOTE: In the case of a corporation, witnesses are not required, but the certificate below must be completed.

CERTIFICATE

I, _____, certify that I am the _____
Official title

of the corporation named as Contractor in the foregoing release; that _____ who signed said release on behalf of the Contractor was then _____ of said corporation; that said release was duly signed

Official title

for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(CORPORATE SEAL)

*Applicable to contracts where unsettled costs claimed by the contractor are less than $100,000.

No. 14-510

IN THE

Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the D.C. Circuit misapplied this Court's *Holland* decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 24.1(b), the following list represents all the parties appearing here and before the United States Court of Appeals for the District of Columbia Circuit.

Petitioner is the Menominee Indian Tribe of Wisconsin, a federally recognized Indian tribe. Respondents are the United States of America, the Secretary of Health and Human Services, and the Director of the Indian Health Service.

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OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit opinion is reported at 764 F.3d 51 ("*Menominee IV*") (Pet. App. 1a-19a). The opinion of the District Court is reported at 841 F. Supp. 2d 99 (D.D.C. 2012) ("*Menominee III*") (Pet. App. 20a-43a). An earlier decision in this dispute by the D.C. Circuit is reported at 614 F.3d 519 (D.C. Cir. 2010) ("*Menominee II*") (Pet. App. 44a-68a), rev'g & remanding *Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) ("*Menominee I*") (Pet. App. 69a-74a).

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. This Court granted a timely petition for certiorari on June 30, 2015 and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Self-Determination and Education Assistance Act, 25 U.S.C § 450m-1(d), provides as follows: "The Contract Disputes Act . . . shall apply to self-determination contracts . . . ."

The Contract Disputes Act, 41 U.S.C. § 7103(a)(4)(A),[1] provides as follows: "Each claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim."

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[1] During the years at issue in this appeal, this provision was codified at 41 U.S.C. § 605(a). The Contract Disputes Act has since been revised and renumbered, but the six-year statute of limitations is substantially unchanged. In this brief the Tribe will follow the decision of the D.C. Circuit in *Menominee IV* in citing to the current codification. Pet. App. 3a n.1.

INTRODUCTION

This case involves a breach of contract claim under the Indian Self-Determination and Education Assistance Act ("ISDA" or "Act"), 25 U.S.C. § 450 *et seq.*, resulting from the Federal Government's failure to fully pay tribal contract support costs required by that Act. See *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005) ("*Cherokee*"). The question now presented is whether the D.C. Circuit erred in holding that the standard was not met for equitable tolling of the six-year statute of limitations under the Contract Disputes Act ("CDA") as incorporated by the ISDA, thus precluding recovery of unpaid contract support costs for certain contract years by the Menominee Indian Tribe of Wisconsin.[2] 25 U.S.C. § 450m-1(d); 41 U.S.C. § 7103(a)(4)(A).

Menominee, an Indian tribe located in northern Wisconsin, has very limited resources and relies mainly on federal funding to provide basic health care services to its members. Pet. App. 99a; J.A. 41-116. The Tribe's formal relationship with the United States dates back to the early 1800's when, through a series of treaties, the Tribe established "peace and friendship" with the United States and ceded the vast majority of its lands to the United States in exchange for its protection and services. *Menominee Indian Tribe of Wis. v. United States*, 39 Fed. Cl. 441, 448 & n.6 (1997). Pursuant to those treaties and to related Acts of Congress, the Federal Government largely managed the Tribe's affairs and provided basic social services to tribal members until 1961, when the Menominee Termination Act of 1954, enacted over the Tribe's

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[2] Petitioner is referred to as "Menominee" or "Tribe" throughout this brief.

strenuous objections, became fully effective. *Id.* at 451-52.

The Termination Act sought to end the responsibilities of the United States to the Tribe, cut off federal services to tribal members, and subjected the Tribe and its lands to State and local laws and taxation. *Id.* at 452. Very few preparations were made to enable the Tribe and its members to cope with these sudden and radical changes. *Id.* The tragic result was economic and social disaster for the Tribe,[3] leading Congress in 1973 to enact the Menominee Restoration Act to restore the Tribe's federal status and its eligibility to receive federal funds for health care and other federal benefits for its members. Pub. L. No. 93-197, 87 Stat. 770 (1973). The painful legacy of termination continues to impact the Tribe and its members today; however, despite the Tribe's lack of wealth it is able to provide health care services to its members through contracts and annual funding agreements with the Indian Health Service ("IHS") pursuant to the ISDA. J.A. 41-116.

The ISDA, designed to allow tribes like Menominee to exercise greater control over the governmental services provided to their members, requires payment of contract support costs associated with each contract in order to cover necessary administrative and overhead expenses not otherwise included in the contract amount. 25 U.S.C. § 450j-1(a)(2). The contract support requirement ensures that tribes (many of which, Congress recognized, lack sufficient sources of independent income) are not forced to subsidize federal responsibilities as

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[3] For a summary of the history and impacts of termination on the Menominee Tribe, see *Menominee Indian Tribe*, 39 Fed. Cl. at 450-57.

a result of exercising their self-determination rights under the Act. S. REP. NO. 100-274, at 12-13 (1988).

The liability of the Government to pay the full amount of contract support costs owed under the ISDA and its contracts has been the subject of litigation for decades. See *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012) ("*Salazar v. Ramah*"); *Cherokee*, 543 U.S. 631. Following this Court's decision in *Cherokee* affirming the Government's liability for certain types of contract support cost shortfalls, several tribes and tribal organizations, including Menominee, filed individual claims (which had at various points in time been the subject of national class action lawsuits) with the IHS under the CDA. Many of those claims, including Menominee's 1996 through 1998 claims, were rejected by the IHS, despite *Cherokee*, on timeliness grounds.

In *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) ("*ASNA II*"), Pet. App. 75a, the Federal Circuit held that the CDA statute of limitations, as incorporated by the ISDA, was equitably tolled for the purposes of materially identical contract support cost claims filed by another ISDA tribal contractor that, like Menominee's claims, had been deemed untimely by the IHS.[4] Under this Court's decision in *Holland v. Florida*,

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[4] ASNA is an inter-tribal consortium of seven federally recognized tribes in the North Slope region of Alaska. ASNA is considered a "tribal organization" under the ISDA and is treated as a tribe for purposes of entering into ISDA contracts and compacts with the IHS. 25 U.S.C. § 450b(*l*); 25 U.S.C. § 450f; 25 U.S.C. §§ 458aaa(a)(5), (b).

> . . . a "petitioner" is "entitled to equitable tolling" only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing.

560 U.S. 631, 649 (2010) ("*Holland*"), quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).[5] On the "unique circumstances of the case," the Federal Circuit found cumulative import in the combination of several factors that affected timely filing of the claims, including: ASNA's reasonable belief that its claims would be included in a national class action pending against the IHS; a prior successful contract support class action certification and later adverse legal developments; and ASNA's diligence in monitoring and reacting to the shifting legal landscape, first as a putative class member and later as an individual claimant. The Federal Circuit found that ASNA acted with reasonable diligence under extraordinary circumstances; that tolling resulted in no prejudice to the Government, which was aware of ASNA's claims as a result of the prior national class action filings; and that the unique

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[5] Though both *Holland* and *Pace* involved criminal defendants seeking to toll the statute of limitations for filing a habeas corpus petition, the Court recently recognized that the two-part *Holland* test for equitable tolling is also appropriate in the context of civil claims against the federal government. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630-31 (2015) (quoting *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231–1232 (2014)). Lower courts have also applied *Holland* in a variety of civil contexts. See, *e.g.*, *Wohlwend v. Shinseki*, 549 Fed. Appx. 1015 (Fed. Cir. 2013) (appeal from Court of Appeals for Veterans Claims under 38 U.S.C. § 7266); *Bergman v. Kindred Healthcare, Inc.*, 949 F. Supp. 2d 852, 860 (N.D. Ill. 2013) (tolling under Fair Labor Standards Act); *Flores v. Predco Servs. Corp.*, 911 F. Supp. 2d 285, 288-89 (D.N.J. 2012) (tolling in personal injury action against private defendant).

federal-tribal relationship weighed in favor of equitable tolling considering the federal obligations to tribes flowing from that relationship. *ASNA II*, 699 F.3d at 1295-98.

Though all of the same considerations apply fully in Menominee's case, Menominee did not benefit from the Federal Circuit's decision because it had appealed the denial of its claims to the D.C. Circuit,[6] which held that equitable tolling was not warranted. Pet. App. 1a-19a (*"Menominee IV"*). The *Menominee IV* and *ASNA II* courts acknowledged the materially similar facts of the two cases, but they disagreed on the application of the equitable tolling standard.[7] The D.C. Circuit rejected the Federal Circuit's comprehensive and unified analysis of the facts and circumstances and denied tolling on the grounds that Menominee failed to identify a specific "external obstacle" that prevented it from timely filing. Pet. App. 18a. As a result, Menominee has been precluded from full recovery under this Court's decision in *Cherokee* of contract support costs to support the operation of its health care programs under the ISDA.

Holland requires courts to undertake an equitable analysis on a "case-by-case basis," rather than according to "mechanical rules," and to determine whether tolling is necessary to relieve hardship that would otherwise be imposed by "hard and fast adherence" to absolute legal rules. *Holland*, 560 U.S. at 649-650. While the

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[6] Under the ISDA, tribal contractors have the option to appeal a contracting officer's decision to the Interior Board of Contract Appeals (now the Civilian Board of Contract Appeals); to bring a *de novo* action in the U.S. Court of Federal Claims (as permitted by the CDA, 41 U.S.C. § 7104(b)); or to bring a *de novo* action in federal district court. 25 U.S.C. § 450m-1(a).

[7] Pet. App. 14a n.5; Pet. App. 87a n.4.

Federal Circuit applied the holistic equitable analysis required by *Holland*, the D.C. Circuit applied a rigid and "mechanical" test—an approach this Court rejected in *Holland* as inconsistent with the exercise of equitable jurisdiction—by imposing a novel "external obstacle" requirement. Because the facts of this case establish extraordinary circumstances justifying equitable tolling, and because the Tribe pursued its rights diligently, the judgment below should be reversed.

STATEMENT OF THE CASE

I. The ISDA and Contract Support Costs

The ISDA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). In enacting the ISDA, Congress declared its commitment

> . . . to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes . . . [and] . . . to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b). The ISDA authorizes tribes to enter into agreements with the Secretary of Health and Human Services ("the Secretary") to assume responsibility to provide contractable programs, functions, services and activities provided for the benefit of tribal members and other beneficiaries that the Secretary would otherwise have administered directly. The mechanism for

doing so relevant to this action is the self-determination contract under Title I of the ISDA. See 25 U.S.C. § 450f.

Section 106(a) of the ISDA requires that, in any ISDA agreement like the Tribe's, the Secretary provide two types of funding: (1) "program" funds, the amount the Secretary would have provided for the contracted programs, functions, services and activities had the IHS retained responsibility for them, 25 U.S.C. § 450j-1(a)(1); and (2) contract support costs, which cover reasonable administrative and overhead costs associated with carrying out the contracted programs, 25 U.S.C. §§ 450j-1(a)(2), (3), & (5).

Congress added the requirement to provide contract support costs (also termed indirect costs) to the ISDA in 1988, in recognition of the fact that many tribes lack the financial means to absorb such administrative and overhead costs, and to ensure that tribes would not be forced to use their limited resources to subsidize federal responsibilities as a condition of participation under the ISDA.[8] The Senate Select Committee on Indian Affairs observed that "[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed[,]" but that the agencies had systematically failed to provide full funding for

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[8] The committee report noted that:

> Tribes and tribal organizations with no independent income are faced with the onerous choice of either reducing the level of services to pay for administrative costs, or else reducing their level of effort to maintain their administrative systems. The Committee is greatly concerned that tribes will choose a third alternative: to retrocede the contract back to the Federal agency.

S. REP. NO. 100-274, at 13 (1988).

such costs. S. REP. NO. 100-274, at 13 (1988).[9] In light of that and other failures of the contracting agencies to faithfully implement the ISDA, Congress also provided strong remedial provisions, including the right of tribal contractors to seek money damages for unpaid contract funds under the CDA and to challenge a contracting officer's decision in either the Court of Federal Claims or federal district court. 25 U.S.C. §§ 450m-1(a), (d); 41 U.S.C. § 7104. The committee report noted:

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law

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[9] The committee report emphasized this failure:

> Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. [. .] It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

Id., at 8-9.

> affords such contractors no effective remedy for redressing such violations.

S. REP. NO. 100-274, at 37 (1988).[10]

Congress's foresight in providing these tribal remedies has proven prescient. While Section 106 of the ISDA, as amended, required full payment of contract support costs from available appropriations, the IHS continued to insist that it was permitted to pay tribal contractors less than the full amount of indirect costs owed under the ISDA and their contracts. It did so based in part on the agency's interpretation of section 106(b), which makes contract funding "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). From 1994 through 1997, the IHS maintained that the Secretary had the discretion to limit "available" funds to the amounts recommended in committee reports on the appropriations bills.[11] Therefore, the IHS severely underpaid the vast majority of tribal contractors, including the Menominee Tribe, a fact documented in the agency's annual contract support cost "shortfall reports." See 25 U.S.C. § 450j-1(c) (mandating annual report to Congress on contract support distribution and deficiencies).

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[10] In 1988, when the CDA was incorporated into the ISDA, there was no statute of limitations for filing administrative claims. The six-year limitation was added later, in 1994. See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a)(1), 108 Stat. 3322 (codified as amended at 41 U.S.C. § 7103(a)(4)(A)).

[11] See, *e.g.*, *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1087–88 (Fed. Cir. 2003) (summarizing and rejecting the Secretary's interpretation); *Cherokee*, 543 U.S. at 644 (same), aff'g *Thompson v. Cherokee Nation of Okla.*

II. The Contract Support Cost Litigation History

In 1990, the Ramah Navajo Chapter filed a class action suit in the U.S. District Court for the District of New Mexico against the Secretary of the Interior alleging that the Bureau of Indian Affairs ("BIA") systematically underpaid indirect costs under its ISDA contracts. *Ramah Navajo Chapter v. Lujan*, No. 1:90-cv-0957 (D.N.M. filed Oct. 4, 1990) ("*Ramah*").[12] Initially, the suit focused solely on claims that the BIA utilized a flawed indirect cost rate calculation methodology that resulted in underpayment. *Id.* The case later came to include "shortfall claims" of the kind Menominee raises in this case, alleging that the Secretary did not pay 100% of indirect costs even as calculated with the diluted rates. See *Salazar v. Ramah*, 132 S. Ct. at 2187-88.

In 1993, Ramah successfully moved for certification of a nationwide class of all tribal contractors who had contracted with BIA under the ISDA. J.A. 35-40. The Government argued that the class could not be certified unless each class member had first exhausted its administrative remedies by filing individual claims with the agency contracting officer as required by the CDA. J.A. 37. The court held, however, that "it is not necessary that each member of the proposed class exhaust its administrative remedies," and that all tribal contractors could participate in and benefit from the class action even if they had not presented separate claims to the agency. J.A. 39. The court reasoned that

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[12] Ramah is a political subdivision of the Navajo Nation and contracts as a "tribal organization" on behalf of the Navajo Nation under the ISDA. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1456 (10th Cir. 1997) ("*Ramah II*"). See *supra* note 4.

exhaustion is not required if it "would be futile or would fail to provide adequate relief, or where an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law." J.A. 38, citing *Association for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993). The court noted:

> Plaintiff's action does not concern a typical contract dispute wherein issues of performance need be addressed. If that were the case, the purposes behind exhaustion of administrative remedies would require that the contract claim first be brought to the attention of an agency contracting officer. Instead, Plaintiff's action challenges the policies and practices adopted by the BIA as being contrary to the law and seeks to make systemwide reforms. In such a case as this, exhaustion of administrative remedies is not required.

J.A. 38-39.

In 1997, the Tenth Circuit ruled in favor of Ramah with respect to the indirect cost rate calculation methodology. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) ("*Ramah II*"). As a member of the *Ramah* class, Menominee thereafter received substantial payments as a result of two partial settlements, without ever submitting individual claims to the BIA. Pet. App. 99a. These class action settlements were approved by the district court. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1109 & 1111 (D.N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1317-1319 (D.N.M. 2002). The Government has never sought to decertify the *Ramah* class; in fact, the *Ramah* class action is still pending and settlement negotiations are underway for remaining shortfall claims. See *Ramah*, Docket entry No. 1290 (D.N.M.

Dec. 16, 2014) (Clerk's minutes noting settlement conference).

The Cherokee Nation filed a separate class action on March 5, 1999, this time against the IHS. *Cherokee Nation of Okla. v. United States*, No. 6:99-cv-0092 (E.D. Okla.) ("*Cherokee Nation*"). Both the class and the claims were nearly identical to those in the *Ramah* case except for the defendant agency. The Cherokee Nation, like the Ramah Navajo Chapter before it, challenged a uniform agency policy—deliberate underfunding of contract support costs for virtually all tribal contractors. The proposed class was defined as "all Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts, or annual funding agreements authorized by the [ISDA] that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001).

The day the *Cherokee Nation* class action was filed, class counsel sent a letter to all tribes (including Menominee) announcing that they may have a claim covered by the class action if they contracted with IHS under the ISDA during the claims period. J.A. 28-30. As a longtime contractor with the IHS, Menominee fit squarely within the putative class. In a General Bulletin accompanying the letter, class counsel assured tribes that "[f]iling the case as a class action has the effect of stopping the running of any statute of limitations against individual tribes eligible for membership in the class." J.A. 34.

Based on these representations from class counsel, as well as Menominee's own experience in the *Ramah* class, the Tribe reasonably believed it need not file its own claims with the agency in order to participate in

the class action, and that the statute of limitations on such claims was tolled at least until such time as class certification might be denied. Pet. App. 99a-100a. Menominee's decision not to separately file and litigate its individual claims at that point in time served not only to conserve the Tribe's own scarce resources, but was consonant with the goals of judicial economy underlying class actions under Federal Rule of Civil Procedure 23. See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983) (Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims); *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974) (efficiency and economy of litigation is a principal purpose of class action procedure under Rule 23).[13]

On February 9, 2001, the Cherokee Nation's motion for class certification was denied. *Cherokee Nation*, 199 F.R.D. at 366. The court found, contrary to the Government's argument, that the proposed class members could be sufficiently identified with reference to the IHS's own shortfall reports, but that the plaintiff had failed to establish other requirements of Rule 23. *Id.* at 363-66 & 366 n.1. Thus, the court did not rule on presentment of claims, as the *Ramah* court had, but indicated that any Tribe listed on the IHS shortfall reports as having experienced a shortfall would have been included in the class, had Rule 23 otherwise been satisfied. On June 25, 2001, the *Cherokee Nation* court ruled on the merits and found that the IHS had no statutory duty to fully fund contract support costs under the ISDA. *Cherokee Nation of Okla. v. United*

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[13] As further discussed at p. 43, *infra*, filing separate claims at the administrative level would most likely have committed Menominee to litigating those claims in federal court in order to preserve them for appeal. 41 U.S.C. § 7104; 25 U.S.C. § 450m-1(a).

States, 190 F. Supp. 2d 1248 (E.D. Okla. 2001). The Cherokee Nation appealed the substantive ruling to the Tenth Circuit, but did not appeal the denial of class certification, making that ruling final.

After the *Cherokee Nation* court denied class certification in 2001, a second class action was filed by the Pueblo of Zuni against the IHS. *Pueblo of Zuni v. United States*, No. 1:01-cv-01046 (D.N.M. filed Sept. 10, 2001) ("*Zuni*"). The proposed class was defined as "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." Complaint, *Zuni*, No. 1:01-cv-01046 Docket entry No. 1 (D.N.M. Sept. 10, 2001), at ¶ 53. *Zuni* was stayed pending the outcome of the *Cherokee Nation* litigation.

When Menominee learned that the Cherokee Nation's motion for class certification had been denied and that the denial had not been appealed, it considered its options. The Tribe attended national tribal meetings on contract support and learned that "the case law was not clear on whether tribal contract support cost claims were valid" and that "most courts had ruled against such claims." Pet. App. 100a. Indeed, on appeal the Tenth Circuit affirmed the district court's substantive ruling in *Cherokee Nation*. *Cherokee Nation of Okla. v. United States*, 311 F.3d 1054, 1063 (10th Cir. 2002). The Ninth Circuit reached a similar conclusion that the Government was not liable for contract support cost shortfalls. *Shoshone-Bannock Tribes v. Sec'y, Dep't of Health & Human Servs.*, 279 F.3d 660 (9th Cir. 2002).

The Menominee Tribe "has limited resources and it has to very carefully weigh whether it will bring a case against the United States." Pet. App. 100a. The decision facing the Tribe following the appeal in *Cherokee Nation* was whether to devote substantial resources to litigate

its claims at that time, even though such litigation would be largely duplicative of the several contract support claims already pending in the federal courts (some of which resulted in circuit court rulings against liability), or to wait. The Tribe believed that the statute of limitations had been tolled during the pendency of the *Cherokee Nation* class certification motion (approximately two years), and that the Tribe therefore had more time to monitor developments in the contract support cost litigation and to make a more rational and informed decision based on the courts' determinations of liability.[14] Pet. App. 100a.

Meanwhile, the Cherokee Nation pursued claims for contract support for other fiscal years in a separate proceeding before the Interior Board of Contract Appeals ("IBCA"). In that proceeding the IBCA held the IHS liable. *Appeals of Cherokee Nation of Okla.*, 99-2 B.C.A ¶ 30,462 (I.B.C.A. 1999), reconsideration denied, 01-1 B.C.A. ¶ 31,349 (I.B.C.A. 2001). The IHS appealed the IBCA ruling and a circuit split was created in 2003 when the Federal Circuit agreed with the IBCA, declaring that there was a statutory right to full funding of contract support costs. *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003).

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[14] In 2001, the motion for class certification in *Zuni* was still pending, and no court had ruled that presentment of administrative claims was a requirement for class membership in the context of contract support cost litigation, let alone that it was a requirement for class action tolling. In the only contract support case where presentment had been raised as an issue—*Ramah*—the court continued to issue rulings that assumed the validity of the class. See, *e.g.*, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1109 & 1111 (D.N.M. 1999); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1317-1319 (D.N.M. 2002).

This Court granted certiorari to resolve the conflict. *Thompson v. Cherokee Nation of Oklahoma*, 541 U.S. 934 (2004). The Tribe, acting on its belief that the *Cherokee Nation* class action had tolled the statute of limitations for putative class members, including Menominee, decided to wait for this Court to conclusively resolve the question of liability before filing its own claims and triggering another duplicative lawsuit. Pet. App. 100a. On March 1, 2005, this Court affirmed the Federal Circuit and overturned the Ninth and Tenth Circuits, holding that the ISDA sets out a duty to fully fund contract support costs and that the Government had to satisfy its contractual obligations out of unrestricted appropriated funds if they were available. *Cherokee*, 543 U.S. 631. Thereafter, on September 7, 2005, the Tribe filed its own contract support claims with the IHS. Pet. App. 101a.

After this Court ruled in *Cherokee* that the Government was liable for contract support cost underpayments, the stay was lifted in the *Zuni* case and the Government filed a motion to dismiss certain claims for failure to exhaust administrative remedies. See *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1101 (D.N.M. 2006). In 2007, the court in *Zuni* denied class certification on the grounds that many of the putative class members did not meet jurisdictional requirements under the CDA because they had not yet presented claims to the contracting officer. *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 443 (D.N.M. 2007). That 2007 ruling was the first to address the issue of presentment since the 1993 *Ramah* ruling, which had approved class certification, and thus the first indication from any court that presentment might be required for a tribe to claim membership in a puta-

tive class of ISDA contractors seeking contract support. By that time, however, Menominee had already filed its administrative claims.

III. Menominee's Claims and the Rulings Below

On September 7, 2005, following *Cherokee*, the Tribe filed claims for contract support cost underpayments in the years 1995 through 2004. Assuming the statute was tolled during the pendency of the *Cherokee Nation* class action, as Menominee had been advised by class counsel, the Tribe's claims were timely. The agency denied the claims for 1996 through 1998 on the basis that they were barred by the six-year statute of limitations in the CDA.[15] The Tribe appealed the denials directly to the federal district court as permitted by 25 U.S.C. § 450m-1 and 41 U.S.C. § 7104 (which was then 41 U.S.C. § 609). In 2008, the district court held that the claims were time-barred and that the statute of limitations was jurisdictional and thus not subject to tolling. Pet. App. 70a.

On appeal, the D.C. Circuit held that the Tribe could not claim the benefit of class action tolling under *American Pipe & Construction Co. v. Utah*, which established that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554 (1974) ("*American Pipe*"). The D.C. Circuit reasoned that Menominee could not have been a member of the *Cherokee Nation* class even if had it been certified because the Tribe

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[15] IHS denied the 1995 claim, which was not subject to the statute of limitations, on the basis of laches. The district court upheld IHS's decision but was reversed on appeal. Pet. App. 66a-67a. The parties subsequently settled the 1995 claim.

had failed to meet the jurisdictional requirement to exhaust administrative remedies. Pet. App. 57a-58a. The Federal Circuit reached a similar conclusion in *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 795 (Fed. Cir. 2009) ("*ASNA I*"), cert. denied, 561 U.S. 1026 (2010).[16] The Federal Circuit's *ASNA I* ruling in 2009 and the D.C. Circuit's *Menominee II* ruling in 2010 were the first to extend the *Zuni* court's reasoning to hold that presentment was a requirement for class action tolling.

Despite holding that class action tolling was not available, the D.C. Circuit held that the CDA six-year statute of limitations is not jurisdictional and is thus subject to equitable tolling. The D.C. Circuit therefore remanded for a determination of whether equitable tolling was appropriate under the facts of the case. Pet. App. 62a-65a.

On remand, Menominee argued that its reasonable reliance on the *Cherokee Nation* class action to toll the limitations period, the unpredictable changes in the legal landscape surrounding contract support, and the futility and expense of submitting its own claims at an earlier time created extraordinary circumstances under which the Tribe acted with reasonable diligence in monitoring the changing legal landscape and determining whether and when to submit its claims. The Tribe argued that these circumstances entitled it to equitable tolling even if class action tolling could not apply. Pet. App. 32a; Pl. Br. in Opp. to Mot. to Dismiss 19-23. The Tribe also argued that the federal trust responsibility to Indian tribal governments and the lack of prejudice to the Government in this case

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[16] This Court has not addressed the applicability of class action tolling under these circumstances.

weighed in favor of equitable tolling. Pl. Reply Br. 22-24; Appellant's C.A. Reply Br. 23. The district court disagreed, and ruled on summary judgment that the claims were time-barred. Pet. App. 37a.

On appeal, the D.C. Circuit affirmed. Pet. App. 2a. The D.C. Circuit acknowledged that "equitable tolling must be applied flexibly, case by case, without retreating to 'mechanical rules' or 'archaic rigidity[,]'" and that in applying *Holland* "courts must keep in view equity's purposes: correcting particular injustices and 'reliev[ing] hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules.'" Pet. App. 10a (internal citations and quotations omitted). The court nevertheless concluded that "The Menominee Tribe faced no extraordinary circumstances because the obstacles the Tribe confronted were ultimately of its own making. [. . .] *At no point was the Tribe prevented by external obstacles from timely filing*." Pet. App. 12a (emphasis added). The court further concluded that the circumstances could not justify equitable tolling even if considered cumulatively, stating:

> [N]one of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims. Some are not obstacles. Neither the "unique government-to-government and trust relationship between the United States and the Tribe," nor the "litigation history" surrounding contract support cost claims, were capable of standing in the Tribe's way. Others we cannot accept. If a lawsuit's "breadth and complexity" were an "extraordinary circumstance," few statutes of limitations would function. And the remaining circumstances—the Tribe's mistaken belief that it would be entitled to class-action

> tolling and that its claims had no hope of success—were the Tribe's own missteps. On the facts of this case, we cannot conclude that a series of events, none extraordinary on its own, piled up to create an extraordinary obstacle.

Pet. App. 18a-19a (internal citations omitted). Finding no such "obstacle," the court of appeals determined that it "need not pass on whether, under *Holland*'s first prong, the Tribe pursued its rights diligently" and that it need not consider "other equitable 'factors,' such as whether the Government would be prejudiced by the application of equitable tolling in this case, or whether equitable tolling should be more readily available to tribes given their special relationship to the United States." Pet. App. 12a n.4.

The D.C. Circuit's approach contrasted sharply (and explicitly) with the Federal Circuit's equitable tolling analysis in *ASNA II*, which involved materially similar facts.[17] The majority in *ASNA II* found that both *Holland* prongs were satisfied, and equitable tolling was warranted, because the contract support litigation

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[17] ASNA had chosen to appeal the IHS's denial of its claims to the Civilian Board of Contract Appeals ("CBCA"), as permitted under 25 U.S.C. § 450m-1(d) and 41 U.S.C. § 7104(a). Following a decision on appeal by the Federal Circuit that class action tolling did not apply in ASNA's case but that the CDA six-year statute of limitations was subject to equitable tolling, a two-judge majority of the CBCA panel held that ASNA had not established facts to justify equitable tolling. See *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009); *Arctic Slope Native Ass'n*, 11-2 B.C.A. ¶ 34,778 (C.B.C.A. 2011). In the CBCA, Board Judge Candida S. Steel filed a thoughtful dissent arguing that the facts justified equitable tolling in light of the *Ramah* precedent, Congressional intent in the ISDA, and the federal obligations flowing from the unique federal-tribal relationship embodied in that Act. *Id.*

landscape represented "unique facts and extraordinary circumstances," and ASNA acted with reasonable diligence in light of the changing legal landscape. Pet. App. 90a & 91a. The court addressed ASNA's reliance on putative membership in class action proceedings (in that case, the *Zuni* class action) and rejected the Government's argument that ASNA should have taken affirmative action to file individual claims despite the *Ramah* precedent. The Federal Circuit opinion concluded:

> Monitoring and reasonably interpreting applicable legal proceedings, judicial order [sic] and opinions, and taking action as necessary does not constitute sleeping on one's rights, particularly in the class action context where parties who believe they are putative class members often remain passive during the early stages of the litigation allowing the named class representatives to press their claims.

Pet. App. 88a-89a. The Federal Circuit reasoned that ASNA acted diligently by participating as a class member in the *Ramah* and *Zuni* litigations and by filing its claims individually in 2005 once it realized that the Government would challenge the *Ramah* precedent. The Federal Circuit ruled that "given the existence of the unambiguous court order [in *Ramah*] that specifically addressed the exhaustion of remedies issue and the fact that ASNA diligently pursued its rights by monitoring the relevant legal landscape, ASNA took reasonable, diligent, and appropriate action as the legal landscape evolved." Pet. App. 89a-90a.

In addition, the Federal Circuit found that tolling the limitations period was "not fundamentally unfair" to the Government because the *Zuni* complaint put the Government on notice of ASNA's contract support

claims, alerting it to the need to preserve evidence, which in any event consisted only of documents in the administrative record. Pet. App. 90a. The Federal Circuit also acknowledged that the special relationship between the Government and Indian tribes "is especially crucial under the ISDA, which Congress passed to facilitate and promote economic growth and development amongst the Indian tribes." Pet. App. 90a. The Federal Circuit concluded that, "[a]lthough not dispositive, the existence of the special relationship between the government and Indian tribes supports our holding." Pet. App. 91a.

The D.C. Circuit below acknowledged the Federal Circuit's decision in *ASNA II*, but elected not to follow the majority view in that case, stating: "In our view, the *Arctic Slope II* majority failed to identify any obstacle that stood in the Tribe's way to prevent timely filing of its claims, as required by *Holland*'s second prong." Pet. App. 14a n.5. This Court granted certiorari in order to determine whether, in rejecting the Federal Circuit's approach, the D.C. Circuit correctly interpreted and applied the *Holland* test.

SUMMARY OF ARGUMENT

The D.C. Circuit's narrow inquiry failed to engage in the type of holistic, fact-specific analysis that *Holland*, and the broader equitable principles it embodies, require. A court sitting in equity should properly consider all the relevant facts and circumstances, but the D.C. Circuit failed to consider the Tribe's diligence at all. Not only is diligence a key component of the *Holland* two-part test, this Court's decisions require that the diligence and extraordinary circumstances prongs of that test be considered together as part of a complete

analysis of all the relevant factors and circumstances.[18] As illustrated by the Federal Circuit's approach in *ASNA II*, in applying *Holland* the D.C. Circuit should have considered the circumstances surrounding the contract support cost litigation in light of the Tribe's diligence in "[m]onitoring and reasonably interpreting applicable legal proceedings, judicial order and opinions, and taking action as necessary[,]"[19] all of which established strong grounds for equitable tolling of the statute of limitations in this case.

Instead, with no rationale or explanation, the D.C. Circuit isolated the "extraordinary circumstances" prong of the *Holland* test and determined that it could not be satisfied in the absence of some specific "external obstacle." *Holland*, however, makes no mention of "external obstacles." Moreover, this Court in *Holland* rejected the Eleventh Circuit's similar "*per se* approach," emphasizing that the exercise of equitable powers must be made on a "'case-by-case' basis, rather than according to 'mechanical rules.'" 560 U.S. at 649-50.

Under any test, it cannot be disputed that this case involves an unusual (and unusually complex) set of facts. Together, the Tribe's experience in *Ramah* and class counsel's advice in *Cherokee Nation* led the Tribe to reasonably believe that the statute of limitations had been tolled during the two years that the *Cherokee Nation* class action was pending. After class certification was denied, but prior to this Court's decision in *Cherokee*, the viability of the Tribe's claims was doubtful, as the two circuit courts to address liability ruled in favor of the Government. At that point in time, the Tribe's

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[18] See *Holland*, 560 U.S. at 652; *Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005).

[19] See Pet. App. 88a.

lack of financial resources to litigate legally questionable claims against the Government and its reasonable belief that class action tolling had extended the deadline to file its claims drove the Tribe's decision to use the time it believed it had left to monitor the ongoing contract support litigation and evaluate the wisdom and utility of filing its own claims.

The Tribe filed shortly after the Government's liability was established by this Court in *Cherokee*, believing its claims were timely. It was not until two years later that the *Zuni* court ruled against class certification on presentment grounds, for the first time undermining the *Ramah* precedent establishing that class participation would be permitted with or without presentment, and not until 2009 and 2010 that the Federal Circuit and the D.C. Circuit applied the *Zuni* court's reasoning to exclude non-presenters from class action tolling. Prior to filing its claims, Menominee had no basis for predicting the *Zuni* court's later reversal of *Ramah* or the resulting consequences for the application of class action tolling; the *Ramah* case had continued as a class action and no other court had addressed presentment in the contract support context.

The D.C. Circuit rejected each of these factors and circumstances—individually and cumulatively—as insufficient to justify equitable tolling based on its application of a novel and rigid "external obstacle" test. Pet. App. 12a-18a. The court's application of that test not only precluded the holistic and equitable analysis of the facts that *Holland* requires and that the Federal Circuit applied in *ASNA II*, it also precluded consideration of other factors relevant in equity and entitled to weight in this case. First, while not determinative, it is relevant that the Government was well aware of Menominee's claims as a result of

the *Cherokee Nation* and *Zuni* class actions,[20] and that the Tribe's claims rely solely on documentary evidence such that the delay in filing does not prejudice the Government in defending against them. Second, the existence of a special relationship between the parties is relevant in equity, and as the Federal Circuit ruled in *ASNA II*, the obligations flowing from the special relationship between the Government and the tribes favors equitable tolling, especially in an ISDA case. Pet. App. 90a.

ARGUMENT

I. The D.C. Circuit misapplied *Holland* by failing to consider both prongs of the equitable tolling test as part of a holistic, fact-based analysis.

In applying *Holland* to assess whether equitable tolling should apply to Menominee's claims, the D.C. Circuit failed to consider whether the Tribe had exercised reasonable diligence in pursuing those claims. Consideration of the claimant's diligence is, however, a fundamental component of any equitable analysis and is particularly important in the application of the *Holland* test. See, *e.g.*, *Holland*, 560 U.S. at 649 & 653; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("*Irwin*"); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).[21] In this case, Menominee's diligence in

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[20] See, *e.g.*, *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429-30 (1965).

[21] As summarized by Justice Story in his treatise on equity jurisprudence, "where an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his own control, or from his own acts done in entire good faith, and in the performance of a supposed duty, *without negligence*, Courts of Equity will interfere to grant him relief." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 89 (6th ed. 1853) (emphasis added).

consciously tracking (and relying on) the contract support class action proceedings, then later monitoring the development of legal precedent, and finally in ensuring that its claims were filed before the expiration of the time Menominee reasonably believed it had to file, justifies equitable tolling in a balance of the equities.

The circuit panel's fundamental error stemmed from its misinterpretation of the two-pronged *Holland* test. The two components of the *Holland* test—diligence and extraordinary circumstances—are not discrete, mutually exclusive factors to be applied separately, as the D.C. Circuit did. Rather, the nature of equity jurisdiction and this Court's equitable tolling jurisprudence establish that extraordinary circumstances *in light of* a party's reasonable diligence—and in light of the equities as a whole—are what validate a claim to equitable tolling. *Holland* thus requires a more holistic and complete analysis of all the factors and circumstances establishing both the diligence and extraordinary circumstances requirements, in light of the relation they bear to each other and to other equitable factors.

First, a court sitting in equity must consider *all* of the relevant facts and circumstances. Whereas the courts of law are limited to certain forms of action and to specific remedies, in contrast "one of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest[.]" 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 28 (6th ed. 1853) (hereinafter "STORY"). This Court thus noted in *Holland* that "often the 'exercise of a court's equity powers . . . must be made on a case-by-case basis.'" 560 U.S. at 649-50 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)). That case-by-case

analysis cannot take place unless a court considers the totality of the circumstances, including whether the party acted with reasonable diligence and good faith.

With respect to equitable tolling specifically, the *Holland* decision illustrates how diligence and extraordinary circumstances function together to establish grounds for tolling, and therefore must be analyzed in tandem. *Holland* involved a death row inmate seeking equitable tolling of the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations for filing a habeas corpus petition. *Holland*, 560 U.S. at 653. The circumstances that had "prevented" timely filing of Holland's petition were simply the failure of his attorney to account for the filing deadline and to file the petition on time. As the Court noted, these two facts alone established only that Holland's attorney had acted negligently, and did not rise to the level of "extraordinary circumstances." *Id.* at 652. Nevertheless, the Court proceeded to consider additional facts establishing Holland's diligence, which were compelling: Holland, for example, wrote many letters to his attorney that "repeatedly emphasized" the importance of identifying and complying with the filing deadlines in his case. *Id.* The Court suggested that the circumstances of the attorney's negligence became extraordinary in light of Holland's forceful and diligent efforts to gain his attorney's attention and to ensure that his petition would be timely filed. *Id.* The Court then remanded the case for a more detailed consideration of *all* the pertinent facts in a manner more consistent with equity's purpose.[22]

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[22] In remanding the case, the Court noted that the district court had focused exclusively on diligence (which it erroneously found lacking), while the Eleventh Circuit had utilized an overly strict rule for extraordinary circumstances. Thus, the Court

The equitable tolling standard in *Holland* has its roots in this Court's decisions in *Irwin* and *Pace v. DiGuglielmo* (544 U.S. 408 (2005) ("*Pace*")), decisions which confirm that the holistic nature of the test requires an analysis of *all* the circumstances present in the case and their bearing on each other. In *Irwin* the Court began its equitable tolling analysis by noting that "Federal courts have typically extended equitable relief only sparingly[,]" (i.e., in extraordinary circumstances). But in describing circumstances rising to that level, the Court focused largely on diligence, explaining:

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin, 498 U.S. at 96 (footnotes omitted).

In *Pace*, this Court first framed the equitable tolling test as having "two elements: (1) that [the litigant] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." 544 U.S. at 418 (citing *Irwin*, 498 U.S. at 96). Although the Court separately identified these two requirements, its analysis of them was unitary and holistic, focusing

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found that "no lower court has yet considered in detail the facts of this case to determine whether they indeed constitute extraordinary circumstances sufficient to warrant equitable relief" consistent with the two-element test. *Holland*, 560 U.S. at 653-54.

on diligence *in light of* the circumstances. The Court found that the petitioner in that case "waited years, *without any valid justification*," to assert his claims, and therefore could not benefit from equitable tolling. *Pace*, 544 U.S. at 419 (emphasis added).

The lesson to be gleaned from *Holland* and its predecessor cases is that equitable tolling requires a claimant to show that he or she acted with reasonable diligence, but that due to some extraordinary set of circumstances, that diligence was rendered ineffective. It is true that both factors must ultimately be present in order for tolling to occur, but since extraordinary circumstances may be defined with reference to a claimant's diligence (as in *Holland* itself), diligence is never irrelevant. The Federal Circuit's approach in *ASNA II* was consistent with these principles, considering the extraordinary facts of the series of contract support class actions in light of ASNA's reasonable diligence as a class member monitoring the legal developments specific to its circumstances.[23] Like ASNA, Menominee acted with at least the reasonable diligence required of it under the circumstances—a fact that should not have been ignored in this case.

II. The D.C. Circuit misconstrued the "extraordinary circumstances" test to require proof that an "external obstacle" affirmatively prevented filing.

Not only did the court of appeals below limit its analysis to the second prong of the *Holland* test, but it also applied a distorted interpretation of that prong to

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[23] The D.C. Circuit expressly declined to follow the Federal Circuit in *ASNA II* on the grounds that the panel majority in that case failed to "separately" address the extraordinary circumstances and diligence prongs. Pet. App. 14a n.5.

demand that an "external obstacle" stood in the way of timely filing. *E.g.*, Pet. App. 12a & 18a. The *Holland* test requires "extraordinary circumstances," not "obstacles." While an external obstacle may constitute an "extraordinary circumstance," such obstacles are not the only kind of extraordinary circumstances that satisfy *Holland*. Moreover, *Holland* instructs that the extraordinary circumstances test, consistent with the exercise of equitable jurisdiction generally, is flexible enough to account for the variety of unforeseen circumstances that may warrant equitable relief. 560 U.S. at 650. Menominee has established that several related factors combined to create the extraordinary circumstances that resulted in the Tribe missing the filing deadline, which it believed had been extended. These facts justify the application of equitable tolling and should not have been dismissed by the court below.

A. The *Holland* test requires "extraordinary circumstances," not "obstacles," and involves a flexible, case-by-case analysis.

Courts sitting in equity are more flexible in their procedures and remedies than courts at law, which, due to the constraints inherent in their jurisdiction, are oftentimes "incapable of the remedy, which the mutual rights and relative situations of the parties, under the circumstances, positively require," STORY § 27. Thus, equitable procedures enable courts "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices" which otherwise would find no legal remedy. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944).

Courts of equity are not entirely unbound from precedent; as this Court noted in *Holland*, "[w]e have said that courts of equity 'must be governed by rules and precedents no less than the courts of law.'" 560 U.S at 649 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). Nonetheless, the Court emphasized that the exercise of equity powers does not involve the perfunctory application of rigid tests:

> In emphasizing the need for "flexibility," for avoiding "mechanical rules," . . . we have followed a tradition in which courts of equity have sought to "relieve hardships which, from time to time, arise from a hard and fast adherence" to more absolute legal rules, which, if strictly applied, threaten the "evils of archaic rigidity[.]"

Id. at 650 (internal citations omitted) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) & *Hazel-Atlas Glass Co.*, 322 U.S. at 248).

In *Holland*, this Court rejected the "overly rigid *per se* approach" to the "extraordinary circumstances" test that had been applied by the Eleventh Circuit. 560 U.S. at 653. That court had found, as a rule, that "even attorney conduct that is 'grossly negligent' can never warrant tolling absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part[,]'" and therefore Holland could not qualify for equitable tolling despite the unique facts of his case. *Id.* at 649. This Court stated that the Eleventh Circuit's standard was "too rigid" in light of the equitable precedent, and went on to explain that courts of equity must "exercise judgment in light of prior precedent, but with awareness of the fact that specific circum-

stances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* at 649-50.[24]

The *Holland* Court concluded that the Eleventh Circuit's strict and specific rule was "difficult to reconcile with more general equitable principles in that it fails to recognize that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id.* at 651.

Like the Eleventh Circuit in *Holland*, the D.C. Circuit in this case adopted a "rigid *per se* approach" to equitable tolling by essentially replacing the "extraordinary circumstances" requirement with an "external obstacle" test. Pet. App. 12a & 18a. However, there is nothing in *Holland*'s extraordinary circumstances test that requires the presence of a specific "obstacle," and certainly not as that term was applied by the D.C. Circuit. To the contrary, the *Holland* test is flexible enough to recognize that, "at least sometimes," other facts and

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[24] Similarly, in a recent case this Court rejected an "unduly rigid" and "mechanical" test adopted by the Federal Circuit in place of the "holistic, equitable approach" previously used by the courts to apply the Patent Act's fee-shifting provision, which authorizes district courts to award attorney's fees to prevailing parties in "exceptional cases." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1754 & 1755 (2014). The Federal Circuit's formulation inflexibly limited "exceptional cases" to two specific circumstances involving sanctionable misconduct or bad faith. This Court held that the "exceptional cases" standard, to the contrary, requires district courts to "determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Id.* at 1756.

circumstances when viewed as a whole could be extraordinary enough to justify equitable tolling.

B. The facts of this case establish that extraordinary circumstances prevented timely filing despite Menominee's diligent efforts.

In this case, the unique legal context created by the long-running dispute over contract support costs, the resulting national litigation and class action precedent, and the after-the-fact decisions on the presentment requirement in *Zuni* and *Menominee II* were among the several factors that together composed the "circumstances" faced by Menominee.[25] These circumstances, particularly in light of Menominee's limited resources and its unique relationship to the Government under the ISDA, rise to the level of extraordinary and establish grounds for equitable tolling under any reasonable test.

1. Ramah *and* Cherokee Nation *class actions.* The court below dismissed the Tribe's reliance on the *Cherokee Nation* class action as a basis for its decision to delay filing an administrative claim. The court determined that it was unreasonable for Menominee to believe it could participate in the *Cherokee Nation* class (or benefit from tolling as a result of the case) without exhausting its administrative remedies, because despite *Ramah*, "the weight of legal authority

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[25] Under *Holland*, it is the totality of the circumstances rather than each individual factor that must be "extraordinary" in order to justify equitable tolling. 560 U.S. at 652 (noting that facts regarding the conduct of Holland's attorney "alone, might suggest simple negligence[,]" but concluding that in light of other facts in the case the circumstances considered as a whole could rise to the level of extraordinary).

was to the contrary." Pet. App. 14a. The court also determined that "[t]he Tribe's reliance on *Ramah* as a reason to expect that it was eligible to participate in the *Cherokee* class was the Tribe's miscalculation, not an external circumstance beyond its reasonable control." *Id.*

The existence of the *Ramah* class action, however, was one of several significant factors outside of Menominee's control that combined to create the extraordinary circumstances under which Menominee was reasonably led to believe it need not (and *should* not) file individual claims in order to diligently pursue its contract support claims against the IHS.

Prior to *Cherokee Nation*, the *Ramah* class certification order was the only ruling addressing class certification in the context of the tribal contract support cost claims. That ruling *approved* class certification over the Government's objection that class members had not met the presentment requirements under the CDA, and was based on unique features of the contract support litigation that distinguished that context from others and from the "weight of authority" on class action and presentment.[26] J.A. 39. When *Cherokee Nation* was filed, then, *Ramah* was directly applicable and confirmed

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[26] The D.C. Circuit's generic conclusion that "the weight of legal authority was to the contrary" with respect to whether each class member must separately exhaust administrative remedies does not reflect the kind of fact-specific inquiry required in an equitable analysis. See *Holland*, 560 U.S. at 650. In this case, the result of class action certification in *Ramah* may have been unique in the broader legal context, but *Ramah* was directly on point and addressed the specific issues unique to the contract support cost litigation. Under the specific facts of this case, then, it was reasonable for Menominee to rely on *Ramah* rather than other authority addressing different situations.

that Menominee could rely on the class action as a means of pursuing its claims or, at the least, rely on class action tolling as a putative class member if the class action ultimately failed. Class counsel likewise advised all tribes that filing the *Cherokee Nation* case as a class action "has the effect of stopping the running of any statute of limitations against individual tribes eligible for membership in the class." J.A. 34.

After certification of the *Cherokee Nation* class was denied, there was no new reason to believe that tolling would not apply. The *Cherokee Nation* court specifically declined to address *Ramah* in denying class certification, noting that its ruling was based on Federal Rule of Civil Procedure 23 and not presentment. *Cherokee Nation*, 199 F.R.D. at 366 n.1. The *Ramah* certification order remained the only decision of any court addressing presentment in the tribal contract support context. Meanwhile, the *Ramah* court continued to issue rulings adding claims and approving settlements, all of which were premised on the validity of the class.[27] It was not until 2007, when the district court denied class certification in *Zuni*, that any court ruled that presentment was required for participation in a class of tribal contractors bringing contract support claims. It was not until 2009 that presentment was held by any court to be a requirement for class action tolling.

Thus, prior to 2005, when Menominee filed its claims, there was no reason for the Tribe to believe either that it would have been precluded from participating in the

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[27] See *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091, 1109 & 1111 (D.N.M. 1999) (approving partial settlement); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1317-1319 (D.N.M. 2002) (discussing addition of claims and approving second partial settlement).

Cherokee Nation class had the class been certified, or that it would be precluded from the benefit of class action tolling on presentment grounds. The change in the law governing presentment in the tribal contract support context—which happened after the Tribe filed its claims—was therefore an extraordinary factor beyond Menominee's control that ultimately prevented it from timely filing. *Cf. Harris v. Carter*, 515 F.3d 1051, 1057 (9th Cir. 2008) (holding statute equitably tolled where petitioner relied on circuit court precedent, later overruled by the Supreme Court, establishing that the deadline to file his claims would be tolled).

Menominee's reliance on *Cherokee Nation* also establishes that it acted with reasonable diligence under the circumstances. In *Irwin*, this Court stated that reliance on a defective pleading—including a defective class action—constitutes grounds for equitable tolling, because under such circumstances "the claimant has actively pursued his judicial remedies[.]" 498 U.S. at 96. The Court cited *American Pipe* as an example of a case where "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members." *Id.* at 96 n.3. Menominee argued in both the district court and the court of appeals that the *Cherokee Nation* class action was a defective pleading that constituted grounds for equitable tolling under *Irwin*; however, the D.C. Circuit failed to even address that argument.[28]

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[28] The district court in *Menominee III* dismissed the *Irwin* Court's analysis, because *American Pipe* was decided on the basis of class action tolling rather than equitable tolling. Pet. App. 37a & n.8. However, the fact that *American Pipe* was decided on class action tolling grounds does not mean that the Court could not cite that case as an example of a set of facts that would satisfy the requirements for equitable tolling.

The D.C. Circuit's analysis would preclude equitable tolling under the same circumstances identified by this Court in *Irwin* as appropriate for tolling–underscoring the fact that the court of appeals applied an overly rigid and narrow test.[29] There was no "obstacle" that prevented the members of the putative class in *American Pipe* from filing individual claims; rather, tolling was warranted because they reasonably relied on a class action that proved defective. 414 U.S. at 538. The D.C. Circuit likewise should have considered Menominee's reliance on the *Ramah* and *Cherokee Nation* class actions as factors contributing to the type of "extraordinary circumstances" required under *Holland* and *Irwin*.

2. *Futility of exhausting administrative remedies and the desire to avoid duplicative and baseless litigation.* The court of appeals also concluded that the futility of exhausting administrative remedies in this case "fail[ed] to clear the 'extraordinary circumstance' threshold." Pet. App. 15a. The court acknowledged the Tribe's arguments that the IHS would almost certainly deny the Tribe's claims, but found that Menominee nevertheless should have filed because "[t]he federal courts, not contracting officers, are the final word on federal law" and Menominee possibly could have succeeded in litigation. Pet. App. 15a-16a.

But Menominee's decision to hold off on filing claims that would inevitably be rejected by the IHS did not ignore the primacy of the federal courts in interpreting federal law. To the contrary, during the pendency of

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[29] *Holland* did not in any way alter *Irwin*'s reasoning, and in fact the equitable tolling test stated in *Holland* derives from *Irwin*. In adopting the two-part test, *Holland* relies on *Pace*, 560 U.S. at 655, and *Pace* in turn relies on *Irwin*, 544 U.S. at 418.

the *Cherokee Nation* class action (a time when, the D.C. Circuit pointed out, "no circuit had [yet] excused the government from its obligation to fully fund contract support costs out of unrestricted appropriations," Pet. App. 16a), Menominee believed there was no need to pursue separate litigation because it was *already* participating in litigation as a member of the class.[30] After class certification was denied, Menominee believed that it need not act immediately because the deadline to file had been extended. In light of Menominee's limited resources and the fact that other tribes and tribal organizations were *already* litigating the same issues in several federal courts, Menominee chose to monitor the pending litigation to see whether liability would be conclusively established rather than immediately file its own duplicative suit. In other words, Menominee decided to wait for the federal courts to issue the "final word" on liability, recognizing that in

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[30] The Tribe's actions were consistent with the presumption that the complaint filed in a class action is filed on behalf of all proposed class members and thereby stands as a properly filed lawsuit until the class certification is resolved. For class actions, it is anticipated that putative class members—and those who reasonably believe they are class members—will not act to file their own pleadings. As explained by the Court, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal Co.*, 462 U.S. 345, 352–53 (1983). See also *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987) (Potential members of a putative class "are expected and encouraged to remain passive during the early stages of the class action and to 'rely on the named plaintiffs to press their claims.'" (quoting *Crown, Cork & Seal Co.*, 462 U.S. at 353)), cert. denied *sub nom. Nassau Cnty. Republican Comm. v. Cullen*, 483 U.S. 1021 (1987). In this context, monitoring the legal landscape is the critical activity demonstrating reasonable diligence. Pet. App. 88a-89a.

the meantime pursuing its own separate claims would be futile and would add nothing new to the existing federal court proceedings except expend greater resources while the existing litigation made its way to this Court.

Not only did Menominee's decision serve to protect its limited tribal resources, it also served to preserve federal administrative and judicial resources. There were hundreds of tribes with likely claims against the IHS for unpaid contract support costs. See *Cherokee Nation*, 199 F.R.D. at 361 (noting an IHS report showing that at least 296 of 329 contracting tribes experienced a shortfall due to the IHS's failure to pay full contract support). The toll on the federal courts, and on the Government in defending against those claims, would have been enormous had every tribal contractor believed it needed to initiate its own lawsuit simply to preserve the viability of its claims in the time period before the question of liability reached this Court. Indeed, class action tolling is based on precisely these considerations of judicial economy and avoiding needless "protective" litigation. *American Pipe*, 414 U.S. at 553-54.

Running contrary to these policy considerations, the D.C. Circuit's reasoning would have claimants aggressively and intentionally pursue duplicative litigation against the Government as a precautionary measure, in case their reasonable belief that the statute of limitations has been tolled is later determined to be wrong. If they do not, they will be forever barred from the benefits of equitable tolling, regardless of the surrounding circumstances, because they will not be able to prove that any "external obstacle" prevented them from prevailing on their claims within the limitations period had they filed suit. Such a rule would make no sense

as a general matter, but it would be particularly misplaced in the context of this contract support litigation. The contract support cost requirement reflects a congressional recognition that many tribes, like Menominee, have no margin to absorb administrative costs. Forcing those same tribes to absorb litigation costs simply to preserve their claims even when they had a good faith belief their claims were tolled offends both equity and common sense.

3. *Risk and expense of filing individual claims.* Menominee's lack of financial resources prevents the Tribe from pursuing every potential claim it may have against the Government or any other well-funded adversary, and stood in the way of the Tribe's filing a claim prior to this Court's ruling in *Cherokee*. The court of appeals only superficially acknowledged this factor, and failed to realistically assess its effect on the Tribe's course of action. The court stated:

> Even assuming the Menominee Tribe lacked the resources to pursue its own litigation in federal court, its eligibility to participate in the *Cherokee Nation* class would have required nothing more than some paperwork. [. . .] What stood between the Tribe and class-action tolling was little more than an envelope and a stamp.

Pet. App. 17a.

There are several flaws in the court's reasoning. First, although the procedure for filing an administrative claim may be simple, the substantive requirements governing the content of a claim alleging contract support cost underpayments are not. The CDA requires that all claims of more than $100,000 be certified by an individual authorized to bind the contractor with

respect to the claim. 41 U.S.C. § 7103(b). The contractor must certify, among other things, that the claim is made in good faith; that "the supporting data are accurate and complete to the best of the contractor's knowledge and belief"; and that "the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable." *Id.* Pursuant to IHS policy, the amount of contract support costs owed is calculated by application of a negotiated indirect cost rate to the direct cost base, which consists of program funding less applicable exclusions and pass-through funds, all of which must be correctly identified according to applicable laws, policies, and circulars. IHS, INDIAN HEALTH MANUAL § 6-3.2E; Pet. App. 101a. In fact, preparation of accurate contract support cost claims consistent with IHS policy and applicable case law requires highly specialized accounting and legal expertise,[31] and is far from being a simple and inexpensive matter.[32]

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[31] See IHS, INDIAN HEALTH MANUAL § 6-3.2E & Exhibit 6-3-H, *available at* http://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_p6c3; *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) ("*Ramah II*").

[32] The irony, of course, is that the very basis of Menominee's claims is that the Government failed to provide the full amount of administrative and overhead costs necessary for activities such as accounting—costs which Congress recognized tribes could not necessarily sustain on their own. S. REP. NO. 100-274, at 8-9 (1988). That Menominee would be penalized for the need to ration these acknowledgedly meager resources in this case is perhaps doubly ironic, given that the Tribe's acute poverty can be traced directly to the Government's actions in purporting to "terminate" its federal trust responsibilities to the Tribe without taking any account of the impacts that sudden termination would have in light of the paternalistic management of tribal affairs up to that point. *Menominee Indian Tribe of Wis. v. United States*, 39 Fed. Cl. 441, 450-456 (1997). This predicament stood in the Tribe's

The court's harsh assessment also ignores the fact that the contracting officer's denial of Menominee's claim (which was all but certain) would have triggered separate deadlines for Menominee to challenge the claim denials. 41 U.S.C. § 7103(g) (a contracting officer's decision on a claim is final unless timely appealed); 41 U.S.C. § 7104 (requiring appeal of a contracting officer's decision to an agency board within 90 days, or alternatively, an appeal to the Court of Federal Claims within 12 months). The "envelope and a stamp" only *begins* the claims process, which then triggers several additional (and far more costly) steps which must be taken in order to preserve the claim. As this very case illustrates, what begins as an administrative claim can easily turn into years of litigation and multiple appeals, all the way to the United States Supreme Court—litigation which may be averted only by abandoning the claims.[33] Further, while *Cherokee Nation*

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way and, under any reasonable and considered application of the equitable tolling test, was an extraordinary circumstance that prevented the Tribe from timely filing.

[33] Prior to this Court's ruling in *Cherokee*, the IHS aggressively resisted liability for full contract support costs in every jurisdiction where these cases were litigated, raising every possible substantive and procedural defense. See, *e.g.*, *Appeals of Cherokee Nation of Okla.*, 01-1 B.C.A. ¶ 31,349 (I.B.C.A. 2001) aff'd *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) aff'd & remanded, *Cherokee*, 543 U.S. 631 (2005); *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248 (E.D. Okla. 2001) aff'd, 311 F.3d 1054 (10th Cir. 2002) rev'd, *Cherokee*, 543 U.S. 631 (2005); *Shoshone-Bannock Tribes of Fort Hall Reservation v. Shalala*, 58 F. Supp. 2d 1191 (D. Or. 1999) rev'd, 269 F.3d 948 (9th Cir. 2001) amended & superseded, 279 F.3d 660 (9th Cir. 2002). Even after *Cherokee*, as this case demonstrates, the IHS has sought in many cases to avoid liability on various procedural grounds. See, *e.g.*, *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009); *Tuba City Reg'l Health Care Corp. v. United States*, 39 F. Supp. 3d 66, 67 (D.D.C. 2014); *Pueblo of Zuni v.*

was pending, pursuing the required appeals would have threatened Menominee's ability to participate as a member of the *Cherokee Nation* (or any other) class.[34]

The court of appeals suggested that Menominee could have avoided litigation by filing its administrative claims and *then* relying on class action tolling to preserve its appeal rights. Pet. App. 17a. That was certainly not assured at the time, and is not entirely clear even now. For years, courts held that the statute of limitations for challenging a contracting officer's final decision in court—which is separate and distinct from the six-year statute of limitations to file an initial claim with the agency—was "jurisdictional" and could not be tolled. See, *e.g.*, *Renda Marine, Inc. v. United States*, 71 Fed. Cl. 782, 789 (2006) (citing numerous cases from the 1990's holding that failure to comply with the appeal deadline divests a court of jurisdiction).[35] The courts interpreted the CDA limitation on

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United States, 243 F.R.D. 436 (D.N.M. 2007); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006).

[34] According to the government, an appeal to the Interior (now, Civilian) Board of Contract Appeals before the 90-day deadline would have excluded Menominee from the *Cherokee Nation* class. *Cherokee Nation*, 199 F.R.D. at 362 (summarizing U.S. argument that class must "exclude tribes that are litigating or have litigated cases in other judicial or administrative forums.").

[35] *Renda Marine* was affirmed in *Renda Marine, Inc. v. United States*, 509 F.3d 1372 (Fed. Cir. 2007). While the courts refusing to toll the CDA's limitations on appealing a contracting officer's decision did so in the context of equitable tolling rather than *American Pipe* class action tolling, there was no reason to believe that class action tolling could apply to a jurisdictional statute where equitable tolling could not. Indeed, just last Term, this Court appeared to observe that if Congress had intended the Clayton Act—the statute of limitations at issue in *American Pipe*—to be jurisdictional, tolling would *not* have been available. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1634-35 & 1635

appeals in light of the statute's finality provision: "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or suit is timely commenced as authorized by this chapter." 41 U.S.C. § 605(b) (now 41 U.S.C. § 7104(g)); *Renda Marine, Inc.*, 71 Fed. Cl. at 789. Since the CDA specifically speaks to the jurisdiction of the courts and appeal boards *after* a contracting officer has rendered a decision, if Menominee had filed claims with the agency but failed to appeal, the Government would certainly have argued, as it did in a later contract support case, that the appeal deadline is "jurisdictional" and not subject to *American Pipe* tolling. See *Ramah Navajo Sch. Bd., Inc. v. United States*, 83 Fed. Cl. 786, 800 (2008).[36] See also, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2014) (distinguishing between statutes of limitations that function as mere "claim-processing rules" and those that speak directly to the jurisdiction of the courts).

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n.8 (2014); *cf. id.* at 1636; *cf. Bowles v. Russell*, 551 U.S. 205, 213 (2007) (statutory deadline for filing notice of appeal is jurisdictional). Moreover, courts frequently conflated *American Pipe* and equitable tolling. See, *e.g.*, *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006) ("The *American Pipe/Crown, Cork & Seal* equitable tolling rule is a limited exception to the universal rule that statutes of limitations are impervious to equitable exceptions."); *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322-23 (2d Cir. 2004) (citing *American Pipe* for the proposition that "equitable tolling has been held appropriate where plaintiff filed and served defective papers before the expiration of the statutory period").

[36] The Court of Federal Claims did not reach this argument, deciding in favor of the U.S. on other grounds.

Contrary to the D.C. Circuit's suggestion, then, Menominee could not safely have counted on class action tolling to save its claims in 1999 through 2001 had it filed them at the administrative level but failed to appeal the agency's denial. Menominee would not have avoided its dilemma with a stamp and an envelope, but only delayed it. The Tribe would still have had to choose between individual litigation—which it did not have the resources to pursue (without depriving the tribal government of funds for services to its members)[37]—and possibly losing its claims to a (stricter) statute of limitations. This dilemma contributed to the "extraordinary circumstances" faced by the Tribe, but was all but ignored by the D.C. Circuit.

4. *Conflicting and adverse legal precedent.* The court of appeals also faulted Menominee for failing to shop around for a more favorable forum after both the Ninth and Tenth Circuits ruled against the Government's liability for unpaid contract support costs, at a time when the Tribe reasonably believed it could afford to wait for a definitive ruling from this Court.[38] The court conceded that "[o]ne can imagine circumstances in

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[37] Tribes are not permitted to use ISDA contract funds to litigate against the United States, so tribal resources must be utilized for that purpose. 25 U.S.C. § 450j-1(k)(7).

[38] The court of appeals observed that "Even after the Ninth and Tenth Circuits held against other tribes on claims like the Menominee Tribe's, the Tribe could have appealed a contracting officer's claim denial in another circuit, and had something more than 'no hope of success.'" Pet. App. 16a. Of course, other Tribes and tribal organizations were already pursuing similar claims in other circuits, including the Cherokee Nation, which ultimately prevailed in the Federal Circuit and then in this Court. *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) aff'd & remanded, *Cherokee*, 543 U.S. 631 (2005).

which the law might be so unfavorable that it functions as an obstacle and perhaps even rises to the level of an extraordinary circumstance[,]" such as "the reversal of previously binding precedent." Pet. App. 17a.[39] But, presumably because Menominee had a choice of forum and could avoid a particular circuit's ruling, the court of appeals found that the adverse legal precedent in this case did not weigh in favor of equitable tolling and the Tribe should have filed earlier than it did. Pet. App. 17a-18a.

Again, the D.C. Circuit's strict approach would create an undesirable rule: as a protective measure, claimants should file legal claims (even weak ones) against the Government (which must then defend against those claims), as soon as possible, in the most favorable possible venue (encouraging forum shopping), regardless of the class action tolling rule. Otherwise, if class action tolling is later found not to apply (as in this case), the claimant will not be able to show an "obstacle" to filing and may be denied the protections of equitable tolling regardless of the equities. Instead of embarking on this aggressive course, however, after class certification was denied in *Cherokee Nation*

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[39] The cases cited by the Tribe were not so limited. In *Harris v. Carter*, 515 F.3d 1051, 1056 (9th Cir. 2008) cert. denied, 555 U.S. 967 (2008), the statute was equitably tolled where petitioner relied on circuit court precedent later overruled by the Supreme Court; and, in *Capital Tracing, Inc., v. United States*, 63 F.3d 859, 863 (9th Cir. 1995), the lack of clear precedent in that circuit and the absence of prejudice to the government were found to be sufficient to justify tolling. In contrast, in *Commc'ns Vending Corp. of Ariz. v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004), cited by the D.C. Circuit for support, the "lack of clear precedent" found insufficient to support tolling was simply an unfavorable administrative decision, which was later overturned on appeal—a very different scenario, involving no circuit court precedent.

Menominee chose to use the time it reasonably believed it had left to diligently monitor existing litigation to see whether there was even any basis for its claims against the Government, before committing itself and the Government to further litigation. It should not be penalized for that reasonable and responsible choice, nor should the Government be permitted to unfairly profit from it.

While conflicting or adverse legal precedent is normally not enough on its own to justify equitable tolling, it is at least worthy of consideration. In this case, the conflicting and adverse precedent combined with Menominee's reasonable belief that the *Cherokee Nation* class action had tolled its claims and given the Tribe time to see whether and where the law would settle on contract support liability. Those factors, in turn, combined with Menominee's lack of financial resources, which requires the Tribe to carefully pick and choose which legal claims to pursue and which is, in fact, one of the underlying reasons why Congress requires that the Government provide contract support under the ISDA. S. REP. NO. 100-274, at 8-9 (1988). Despite this confluence of factors the Tribe was diligent in monitoring the changing legal environment, evaluating its options, and watching the clock based on the time period the Tribe believed it had to file. Considered together, and in light of the Government's decades-long attempt to skirt application of the contract support cost requirement, the circumstances were extraordinary and warrant the application of equitable tolling to avoid injustice and accord necessary relief. *Holland*, 560 U.S. at 650.

III. The D.C. Circuit wrongly refused to consider additional equitable factors relevant to an equitable tolling analysis.

The balance of equities in this case includes additional factors which the D.C. Circuit specifically declined to consider but which were considered by the Federal Circuit in *ASNA II* and weigh in favor of equitable tolling: the Government, which seeks to be excused from its liability under *Cherokee*, would not be prejudiced by the tolling of the limitations period, and stands in a special relationship with the Tribe under the ISDA which provides added justification for tolling under traditional equitable principles. See Pet. App. 12a n.4; Pet. App. 90a-91a.

A. The absence of prejudice to the Government in this case weighs in favor of equitable tolling.

Equitable tolling analysis requires inquiry into the impact on the Government of applying tolling. Specifically, "[A]bsence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply," even though it is not an independent basis for tolling. *Hedges v. United States*, 404 F.3d 744, 753 (3d Cir. 2005). See also, *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) ("absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified"); *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 863 (9th Cir. 1995) (". . . the absence of demonstrated prejudice to the government justifies equitable tolling of the limitations period[.]"). In this case, the delay allowed by equitable tolling has no prejudicial impact on the Government, a fact that weighs strongly in favor of applying the doctrine.

First, the Government has been on notice of the Tribe's claims (and those of all other tribal contractors) since at least 1999, when the Cherokee Nation filed its class action. This is a key reason why courts apply equitable tolling to defective pleading cases (which, as noted by this Court in *Irwin*, include defective class actions). *Irwin*, 498 U.S. at 96 n.3; *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429-30 (1965) ("Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy[.]"). Tolling is consistent with "essential fairness to defendants" when the class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. As the *ASNA II* court noted, the *Zuni* class action—like the *Cherokee Nation* class action before it—"put IHS on notice of the exact nature and scope" of the claims. Pet. App. 89a-90a.

Second, the Tribe's claims rely solely on documentary evidence—the contracts, funding agreements, indirect cost rate agreements, and shortfall reports—rather than the testimony of witnesses. Thus, the passage of time does not prejudice the Government's defense. The Federal Circuit found this to be a significant factor in its equitable tolling analysis. Pet. App. 90a.

B. Equitable tolling is supported in this case by the special government-to-government relationship between the United States and Indian tribes.

The existence of "some peculiar confidential or fiduciary relation between the parties" is a relevant factor in equitable analysis, and equity jurisdiction has

commonly been viewed as a means "to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a Court of Law." STORY § 307;[40] *id.* at § 59.

In this case, the ISDA and the Tribe's contracts specifically invoke the special government-to-government relationship between tribes and the United States. In declaring its policy of self-determination, the ISDA states that "Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole . . . ." 25 U.S.C. § 450a(b). The Tribe's contracts mirror the statutory model agreement: "The United States reaffirms its trust responsibility to the Menominee Indian Tribe of Wisconsin . . . ." J.A. 57;[41] *cf.* 25 U.S.C. § 450*l*(c).

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[40] Justice Story explained:

> In this class of cases, there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which Courts of Equity act in regard thereto, stands, independent of any such ingredients, upon a motive of general public policy; . . . [courts of equity] will, therefore, often interfere in such cases, where, but for such a peculiar relation, they would either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner.

STORY § 307.

[41] This contract applied in calendar years 1996, 1997, and 1998. The successor contract had the same provision—as required by the ISDA. 25 U.S.C. § 450*l*(c).

In its report accompanying the 1988 amendments to the ISDA, the Senate Committee invoked the tribal-federal relationship and discussed it at length, noting, in part:

> The federal policy of Indian self-determination is premised upon the legal relationship between the United States and Indian tribal governments. [. . .] Trust obligations define the required standard of conduct for federal officials and Congress. Fiduciary duties form the substantive basis for various claims against the federal government for breach of its trust responsibility. Even more broadly, federal action toward Indians as expressed in treaties, agreements[,] statutes, executive orders, and administrative regulations is construed in light of the trust responsibility.

S. REP. NO. 100-274, at 3 (1988). Just as equity tempers rigid rules, *Holland*, 560 U.S. at 650, "the federal government's trust responsibility [to Indians] tempers all of the ordinary contract rules as applied to self-determination contracts." S. REP. NO. 100-274, at 36 (1988). As recognized by the Federal Circuit in *ASNA II*, these principles, while not dispositive, should not be ignored in determining whether tolling of the statute of limitations is called for in a given case. Pet. App. 91a. Here, the federal-tribal relationship upon which the ISDA itself is premised is a unique factor weighing in favor of equitable tolling to allow the Tribe to access the benefits intended for it under that Act.

CONCLUSION

This case involves "particular injustices" associated with the long-running contract support litigation, the type and character of which the exercise of equitable powers is intended to correct. *Holland*, 560 U.S. at 650. For decades the Government has resisted its obligation to "pay each tribe's contract support costs in full," *Salazar v. Ramah*, 132 S. Ct. at 2186, and it now asserts the statute of limitations to avoid liability. Under the extraordinary circumstances of the contract support litigation and in light of Menominee's reasonable diligence in pursuing its claims, the application of equitable tolling is warranted to allow the court to reach the merits of the Tribe's claims. Because the D.C. Circuit's refusal to extend equitable tolling in this case was based on its misapplication of *Holland* and was inconsistent with the fundamental principles of equity, the ruling below should be reversed.

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No. 14-510

In the Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals misapplied this Court's decision in *Holland* v. *Florida*, 560 U.S. 631 (2010), when it ruled that petitioner was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Education Assistance Act (25 U.S.C. 450 *et seq.*) claims under the Contract Disputes Act of 1978 (41 U.S.C. 7101 *et seq.*).

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 764 F.3d 51. The opinion of the district court (Pet. App. 20a-43a) is reported at 841 F. Supp. 2d 99.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The petition for a writ of certiorari was filed on November 3, 2014, and was granted on June 30, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

Petitioner, Menominee Indian Tribe of Wisconsin (the Tribe), is a federally-recognized Indian tribe. Pet. App. 21a. For the years 1996 through 1998, the Tribe entered into contracts with the Indian Health Service (IHS), an agency of the Department of Health and Human Services (HHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, 88 Stat. 2203 (25 U.S.C. 450 *et seq.*), to provide federally-funded health-care services to members of the Tribe and other eligible beneficiaries. See Pet. App. 22a.

The Tribe raised no issue respecting the government's payments pursuant to these ISDA contracts until September 7, 2005, when it filed claims pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.*, for additional contract-support-costs funding. See Compl. ¶ 8; Pet. App. 8a, 47a, 70a n.2. Those claims were filed after the expiration of the CDA's six-year period for presenting such claims. 41 U.S.C. 7103(a)(4).

The question in this case is whether the Tribe demonstrated that it pursued its contract-support-costs claims diligently and that some extraordinary circumstance prevented timely filing of those claims, such that the CDA's six-year limitations period should have been equitably tolled for the duration of the Tribe's delay.

1. a. Congress enacted ISDA in 1975 to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration"

of federal programs, functions, services, and activities for Indians. § 3(b), 88 Stat. 2204; 25 U.S.C. 450a(b). Until that time, the federal government itself generally administered federal programs for Indians. See S. Rep. No. 274, 100th Cong., 1st Sess. 2-3 (1987) (Senate Report). Under ISDA, tribes may elect to enter into "[s]elf-determination contracts" with the Secretary of the Interior (Interior) or the Secretary of HHS, as appropriate, to assume operation of such federally-funded programs. 25 U.S.C. 450f.[1]

A tribe is eligible to receive ISDA contract funding equal to the funding that the relevant Secretary would have otherwise expended—also known as the "Secretarial amount"—to operate the particular contracted programs during the year in question. J.A. 119-120 (Fisher Decl. ¶ 9); see 25 U.S.C. 450j(c)(2), 450j-1(a)(1), 450*l*(c) (model agreement § 1(b)(4) and (f)(2)). ISDA also requires the government to award additional funding, above the Secretarial amount, to reimburse a tribe for reasonable "contract support costs" it incurred. 25 U.S.C. 450j-1(a)(2). Funding for contract support costs covers activities of the tribe that are necessary to ensure contract compliance and prudent management and that are normally not carried on by Bureau of Indian Affairs (BIA) or IHS in its direct operation of the programs. 25 U.S.C. 450j-

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[1] Tribes contract with HHS to operate healthcare programs, functions, services, and activities under ISDA. § 104(b), 88 Stat. 2208. Tribes contract with Interior to administer a wide range of federal programs and services for Indians, including social services, natural resources protection, public safety services such as police and fire preparedness, and elementary and secondary education. § 104(a), 88 Stat. 2207-2208.

1(a)(2) and (3).[2] Those costs may vary from year to year, and the sums to be provided are negotiated in annual funding agreements. Pet. App. 22a-23a; see 25 U.S.C. 450j(c)(2), 450j-1(a)(3)(B).

b. Congress amended ISDA in 1988 to apply the CDA to contract disputes arising under ISDA. See 25 U.S.C. 450m-1(d) (the CDA "shall apply to self-determination contracts"). See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 206, 102 Stat. 2295. The CDA governs all contract disputes between government contractors and the United States and establishes a mandatory administrative process for resolving such disputes. See 41 U.S.C. 7102(a).[3]

The CDA includes a mandatory presentment requirement. A contractor must submit "[e]ach claim" it may have against the government to a contracting officer for a decision on the claim. 41 U.S.C. 7103(a)(1) and (2); see 25 C.F.R. 900.215-900.230.[4] A

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[2] Contract support costs may be categorized as either direct or indirect. Indirect contract support costs may be determined, in part, using an indirect cost rate agreement, subject to adjustments to avoid duplication of funding provided in the Secretarial amount. See 25 U.S.C. 450j-1(a)(2)(A), (B) and (3); see *Babbitt* v. *Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1376 (Fed. Cir. 1999) (indirect cost rate determined by negotiations with Interior's Office of the Inspector General), cert. denied, 530 U.S. 1203 (2000); see also *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 635 (2005) (describing use of an "indirect cost rate").

[3] This brief, like the court of appeals' decision (see Pet. App. 3a n.1), primarily cites to the current codification of the CDA rather than its prior codification at 41 U.S.C. 601 *et seq.* (2006).

[4] Some courts, by way of shorthand, refer to the requirement that a contractor present a claim to the contracting officer as an

CDA claim "need not be detailed, and may consist of a short written statement outlining the basis of the claim, estimating damages, and requesting a final decision." Pet. App. 4a; see 25 C.F.R. 900.218 (defining a CDA claim as a "written demand by one of the contracting parties" seeking "[p]ayment of a specific sum of money under the contract," "[a]djustment or interpretation of contract terms," or "[a]ny other claim relating to the contract").

In 1994, Congress amended the CDA by adding a statute of limitations for presentment of a claim to the contracting officer, providing that "[e]ach claim by a contractor * * * shall be submitted within 6 years after the accrual of the claim." Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a)(1), 108 Stat. 3322 (41 U.S.C. 7103(a)(4)(A)). That six-year deadline applies to claims arising from contracts awarded on or after October 1, 1995. *Id.* § 10001(b)(3), 108 Stat. 3404; 48 C.F.R. 33.206(a).

As a general matter under the CDA, "[t]he contracting officer's decision on a claim is final and conclusive and is not subject to review[,] * * * unless an appeal or action is timely commenced as authorized by [the CDA]." 41 U.S.C. 7103(g). A contractor may challenge a contracting officer's decision by taking an administrative appeal to a board of contract appeals or by instituting an action for breach of contract in the

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"exhaustion" requirement. As explained below, however, although the CDA requires a contractor to present its claim to a contracting officer, it does not require a contractor to fully exhaust available administrative remedies by thereafter pursuing an optional administrative appeal to a board of contract appeals. See 41 U.S.C. 7104; see also, *e.g.*, *Pueblo of Zuni* v. *United States*, 467 F. Supp. 2d 1099, 1107 (D.N.M. 2006); pp. 5-6, *infra*.

Court of Federal Claims (CFC). 41 U.S.C. 7104(a) and (b)(1), 7105(b). Review may then proceed to the Court of Appeals for the Federal Circuit from the decision of the agency appeals board (in this case, the Interior Board of Contract Appeals (IBCA), which is now the Civilian Board of Contract Appeals), or of the CFC. 28 U.S.C. 1295(a)(3); 41 U.S.C. 7107(a)(1); see 25 U.S.C. 450m-1(d).

ISDA also provides that a tribe may challenge a contracting officer's decision through an action in federal district court. The district court's jurisdiction over a claim for money damages in such an action is "subject to the provisions of [the CDA] and concurrent with the [CFC]." 25 U.S.C. 450m-1(a) (subjecting district court jurisdiction to subsection (d)); 25 U.S.C. 450m-1(d) (CDA "shall apply" to self-determination contracts). An appeal of the district court's decision may then be taken to the appropriate circuit court of appeals. 28 U.S.C. 1291.

2. The payment of contract support costs under ISDA self-determination contracts has been the subject of substantial litigation. Tribes have advanced a variety of claims that challenge the government's compliance with particular contract terms, or that dispute whether the government has paid the full amount of contract support costs that ISDA requires.[5]

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[5] In the predominant category of claims, described as "shortfall" claims, tribes have sought the difference between what they claimed were full contract support costs owed under ISDA and the agreed-upon amount for such costs in the tribe's contract. See, *e.g.*, *Pueblo of Zuni* v. *United States*, 243 F.R.D. 436, 440-441 (D.N.M. 2007). In some instances, tribes also have alleged that the government promised an additional amount in the annual funding agreement that had not been paid. See, *e.g.*, *Cherokee Nation*, 543 U.S. at 635-636. The government did not pay those additional

In addition, beginning in fiscal year 1994, Congress imposed statutory caps on the total appropriations available for contract-support-cost payments under ISDA and applied such caps to IHS contracts from 1998 onward. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-83, Tit. II, 111 Stat. 1583; U.S. Br. at 8, *Salazar* v. *Ramah Navajo Chapter*, No. 11-551 (Feb. 17, 2012) (listing appropriation caps). That action by Congress generated further litigation challenging the impact of those caps on the government's obligation to pay the "'full amount' of 'contract support costs' incurred by tribes in performing their contracts." See, *e.g.*, *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2186 (2012) (quoting 25 U.S.C. 450j-1(a)(2) and (g)); *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 635-637 (2005).

3. In this case, the Tribe signed "Annual Funding Agreements" with IHS for the years 1996 through 1998 which specifically identify the ISDA contract funding for each year, including funding for contract support costs. Pet. App. 22a. On May 26, 1999, the

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amounts in years 1998-2013 because insufficient appropriations by Congress were available to the agency to pay all of its obligations, including the obligation to fully fund contract support costs. *Ibid.* Another category of claims, called "rate miscalculation" or "rate dilution" claims, has involved challenges to the formula used by Interior to calculate tribes' indirect cost rates, with allegations that the rate should be adjusted upward to account for other funding sources that did not pay indirect costs. See, *e.g.*, *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1459, 1463 (10th Cir. 1997) (describing miscalculation theory). In negotiating indirect contract support costs with tribes, IHS utilizes the rate calculated by Interior. See 25 U.S.C. 450b(g); *Ramah Navajo Chapter* v. *Salazar*, 644 F.3d 1054, 1058 (10th Cir. 2011).

Tribe's Administrator executed a contract release form for the 1996-1998 contracts, that fully released all claims without reservation or exception.[6] J.A. 127 (Fisher Decl. ¶ 29), 240-242 (contract release). On September 7, 2005, however, the Tribe filed claims pursuant to the CDA, seeking additional funding for contract support costs. See Compl. ¶ 8; Pet. App. 8a, 47a, 70a n.2. Those claims were filed after the expiration of the CDA's six-year period for presentment of a claim for each of the three years. 41 U.S.C. 7103(a)(4).

The Tribe now alleges that it failed to timely file those claims because it reasonably relied on two other federal suits that challenged certain aspects of the payment of contract-support-costs funding to tribes: a nationwide class action filed by the Ramah Navajo Chapter, and a lawsuit filed by the Cherokee Nation and Shoshone Paiute Tribes.

a. In 1990, the Ramah Navajo Chapter filed a class action in the District Court for the District of New Mexico, alleging that BIA underpaid indirect contract support costs under its ISDA contracts by applying miscalculated indirect cost rates. *Ramah Navajo*

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[6] When the term of each annual funding agreement expires, the Area Office for the IHS Bemidji Area, in which the Tribe is located, provides tribal contractors with a contract release form, which states the total amount of funding awarded under the contract and provides space for the contractor to state any exceptions for claims that it does not release. J.A. 126 (Fisher Decl. ¶ 27); see J.A. 240-242 (contract release). The IHS Bemidji Area Chief Contracting Officer, William Fisher, testified that many tribal contractors decline, without penalty, to execute the release form. J.A. 126-127 (Fisher Decl. ¶ 28). He further stated that IHS would continue to negotiate with such a tribe for future contracts. *Ibid.* Indeed, ISDA would not permit IHS to decline to contract with a tribe on that ground. 25 U.S.C. 450f(a)(2).

Chapter v. *Lujan*, No. 90-cv-957 (D.N.M. Oct. 1, 1993); see J.A. 35.

Central to the Tribe's current argument for equitable tolling is its purported reliance on an unpublished memorandum opinion, issued by the district court in *Ramah* in 1993, certifying a class over the government's objection to the inclusion of tribes that failed to present their claims to the BIA contracting officer, as required by the CDA. J.A. 36-39 (*Ramah* Memorandum Opinion). The district court in *Ramah* agreed with the government that presentment (which the court referred to as "exhaustion") is normally a "jurisdictional prerequisite" to suit under the CDA. But the court decided that presentment was not required in *Ramah* because the suit "d[id] not concern a typical contract dispute wherein issues of performance need be addressed," but rather challenged "the [BIA's] policies and practices" and sought "to make systemwide reforms." J.A. 38-39.

In 1997, the Tenth Circuit recognized the validity of the *Ramah* class's allegation that BIA used an improper rate calculation to determine contract support costs. *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455. Following the remand from the Tenth Circuit's decision, the district court, in 1999, approved a partial settlement of claims for the years 1989 to 1993. *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091, 1095, 1103 (D.N.M.). As a class member, the Tribe received nearly $800,000. Pet. App. 6a. In 2002, the Tribe benefitted from a second partial class settlement involving subsequently-added contract-support-costs claims. See *Ramah Navajo Chapter* v.

Norton, 250 F. Supp. 2d 1303, 1305-1306, 1316 (D.N.M.) (approving second partial settlement).[7]

b. On March 5, 1999, the Cherokee Nation and Shoshone Paiute Tribes filed suit and sought certification of a putative class that included "Indian tribes and tribal organizations operating [IHS] programs under [ISDA] contracts * * * that were not fully paid their contract support costs needs" between 1988 and 2000. *Cherokee Nation* v. *United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001); see *Cherokee Nation* v. *HHS*, No. 99-cv-92 (E.D. Okla.). The Tribe now asserts (Br. 34-38) that it relied on its supposed membership in the *Cherokee Nation* putative class to represent its interests, rather than submit its own contract-support-costs claims to IHS.

On February 9, 2001, however, the district court denied class certification in *Cherokee Nation*, finding that, because the individually-negotiated tribal contracts lacked "standard language" defining "'full' contract support costs," the class lacked commonality and typicality under Rule 23 of the Federal Rules of Civil Procedure. 199 F.R.D. at 363-365. The court also found that the class suffered from conflicts of interest because tribes were competing for a finite

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[7] Other aspects of the *Ramah* litigation continued. In 2012, this Court held the government liable for "the full amount of 'contract support costs' incurred by tribes in performing their contracts," notwithstanding the express statutory caps imposed by Congress on the total funds available to BIA to pay such costs. See *Ramah*, 132 S. Ct. at 2186, 2191-2195. In September 2015, the parties sought preliminary approval of a final settlement agreement in *Ramah*. See *Ramah Navajo Chapter* v. *Jewell*, No. 90-cv-957, (D.N.M. Sept. 16, 2015) (Doc. 1306).

pool of government funds. *Id.* at 365-366.[8] Following the denial of class certification, the *Cherokee Nation* case proceeded only on the claims of the named plaintiffs, and the district court subsequently denied those claims on the merits. *Cherokee Nation* v. *United States*, 190 F. Supp. 2d 1248, 1259-1261 (E.D. Okla. 2001). The plaintiffs appealed the district court's merits decision, but not the denial of class certification, and the Tenth Circuit affirmed. *Cherokee Nation* v. *Thompson*, 311 F.3d 1054, 1060, 1063-1065 (2002). Also in 2002, the Ninth Circuit denied another tribe's similar contract-support-costs claims. See *Shoshone-Bannock Tribes of Fort Hall Reservation* v. *Secretary, Dep't of Health & Human Servs.*, 279 F.3d 660, 663.

c. Meanwhile, the Cherokee Nation pursued similar contract-support-costs claims against IHS in an administrative appeal to the IBCA, which ruled in Cherokee Nation's favor. See *Appeals of Cherokee Nation*, No. 3877, 1999 WL 440045 (IBCA June 30, 1999) (holding tribe entitled to "full payment of its [contract support costs]" for work already performed), aff'd on reconsideration, *Appeals of Cherokee Nation*, No. 4000/98, 2001 WL 283245 (IBCA Mar. 21, 2001). The Federal Circuit affirmed, holding that the government was required to "reprogram" funds from other sources to pay tribes' "full contract support

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[8] The district court in *Cherokee Nation* rejected the plaintiffs' contention that the certification of the class in *Ramah* provided precedent supporting class certification, noting that in *Ramah* the government had opposed certification because the class included tribes that had not presented their claims to BIA and that the court in *Ramah* had failed to consider the requirements of Rule 23. 199 F.R.D. at 366 n.1.

costs." *Thompson* v. *Cherokee Nation*, 334 F.3d 1075, 1079, 1088 (2003).

d. This Court granted certiorari in *Cherokee Nation* to resolve the circuit split among the Ninth, Tenth, and Federal Circuits on the issues raised regarding the government's liability for contract support costs. *Cherokee Nation*, 543 U.S. at 635-636. In March 2005, this Court affirmed the decision of the Federal Circuit, holding that the government was liable for the full amount of the tribes' contract support costs for fiscal years 1994 through 1997. *Id.* at 634, 636.[9]

4. It was only after this Court's *Cherokee Nation* decision—and after the CDA's six-year limitations period had expired—that the Tribe filed its own claims with the IHS contracting officer that it should have been paid a greater amount for contract support costs for the years 1996, 1997, and 1998.[10] Pet. App. 8a. Each claim consisted of a brief letter from the Tribe to the contracting officer (Claim Letters) and

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[9] On September 10, 2001, a third putative class action (the second against IHS) was filed in the District of New Mexico, this time alleging that contract support costs were improperly calculated. *Zuni*, 467 F. Supp. 2d at 1104-1105. In December 2001, the district court stayed that action pending the appellate proceedings in *Cherokee Nation*. *Id.* at 1106-1114. On October 11, 2006, the court in *Zuni* dismissed the non-presented claims for contract support costs, and in May 2007, the court denied class certification because of the existence of non-presented claims within the putative class. 243 F.R.D. at 442-443.

[10] Because the contract claims accrued by no later than the end of December of each calendar-year contract, the statute of limitations expired for the 1996, 1997, and 1998 contracts by the end of December in the years 2002, 2003, and 2004, respectively. See Pet. App. 70a n.1.

alleged that the Tribe was owed additional funding.[11] In particular, the Claim Letters asserted that for each of those years: (1) IHS owed the Tribe a specified dollar-amount of "shortfall," because "IHS paid [the Tribe] less than its full [contract support costs]" and should have "reprogrammed funds * * * to pay tribes the full [contract support costs] due under their contracts," and (2) applying the rationale of the Tenth Circuit's 1997 decision in *Ramah*, 112 F.3d 1455, IHS had "miscalculated the amount of indirect costs * * * due" under its annual funding agreements. Lodged Materials 2, 5, 8.

On May 1, 2006, the contracting officer issued decisions denying each of the Tribe's claims. Lodged Materials 11-33; Compl. ¶ 9. The contracting officer first denied each claim as untimely because it was filed more than six years after it accrued, and thus was barred by the CDA's statute of limitations, 41 U.S.C. 7103(a)(4). See Lodged Materials 15-16, 21-22, 31-33. In the alternative, the contracting officer denied each of the Tribe's claims on the merits, determining that IHS had, in fact, paid the amounts agreed upon in the annual funding agreements and that no additional payment was due.[12] *Id.* at 14-15, 22-23, 29-

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[11] Copies of the Claim Letters for 1996 through 1998, and the IHS contracting officer's decisions denying those claims, have been lodged with the Clerk of this Court pursuant to Supreme Court Rule 32.3 and have been consecutively paginated. This brief cites to the Lodged Materials according to that pagination.

[12] The decisions of the contracting officer explained that the agency's accounting records reflected payments to the Tribe in the exact amount owed under each of the contract's Annual Funding Agreements. The contracting officer also found no basis for IHS to adjust the indirect cost rate that the Tribe negotiated with Interior and insufficient information to show any flaw in Interior's

31. The contracting officer further found that IHS could rely on the Tribe's unconditional execution of the contracts and the contract release. See *id.* at 15, 22, 30. Under these circumstances, the contracting officer found the Tribe was "barred from seeking retroactive adjustment of the [c]ontract terms at this time." *Ibid.*

5. a. The Tribe sought judicial review of the contracting officer's decision in the District Court for the District of Columbia. The Tribe did not dispute that its claims for the years 1996 through 1998 were untimely, but it argued that the limitations period was subject to either class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), or equitable tolling. The district court initially dismissed the suit on the ground that the six-year limitations period was jurisdictional and therefore did not permit tolling. Pet. App. 70a-71a & n.2 (*Menominee I*).

The D.C. Circuit reversed in part and remanded. Pet. App. 44a-68a (*Menominee II*). The court of appeals concluded that the CDA's six-year limitations period for filing a claim with a contracting officer is not jurisdictional, *id.* at 49a-55a, and did not necessarily preclude either class-action tolling or equitable tolling. See *id.* at 55a-65a. The court nonetheless held

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methodology for calculating that rate. See Lodged Materials 15-16, 22-23, 31-33. The contracting officer further explained that, in response to the Tenth Circuit's decision in *Ramah*, 112 F.3d 1455, Congress had amended ISDA to prohibit the Tribe's claimed adjustment with regard to IHS-funded contracts. See *ibid.*; see also 25 U.S.C. 450j-2. Because the parties have been litigating the issue of whether the Tribe's claims are time-barred, the question of liability under the contracts and the ISDA remains a matter of dispute.

that the Tribe was not entitled to class-action tolling during the pendency of the class-certification motion in *Cherokee Nation* because its failure to file a CDA claim with IHS rendered the Tribe "ineligible to participate in the class action at the time class certification [was] denied." *Id.* at 57a-58a. The court of appeals remanded to the district court to resolve the Tribe's contention that the six-year limitations period for filing a claim should nonetheless be equitably tolled. *Id.* at 65a.

b. On remand, the district court found equitable tolling unwarranted and entered summary judgment for the government. Pet. App. 28a-37a (*Menominee III*). Quoting this Court's decision in *Holland* v. *Florida*, 560 U.S. 631, 649 (2010), the court explained that "a litigant must establish two things for equitable tolling to apply: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" Pet. App. 28a.

The district court concluded that the Tribe's asserted reasons for failing to file a timely claim "do not, individually or collectively, amount to 'an extraordinary circumstance'" that could warrant tolling. Pet. App. 34a. The court observed that the Tribe admitted that it was "aware that it only had six years to file a claim, but assumed that the deadline would be tolled based upon *Cherokee Nation*." *Id.* at 33a (citing *id.* at 100a ¶ 8 (Wakau Decl. ¶ 8)). The court noted that although "filing an administrative claim is a relatively simple process," the Tribe could not "point to any affirmative act it took in over six years to pursue its claim diligently." *Id.* at 37a.

c. The D.C. Circuit affirmed.[13] Pet. App. 1a-19a (*Menominee IV*). The court of appeals agreed with the district court that the Tribe failed to establish any "extraordinary circumstance" warranting tolling. *Id.* at 2a (quoting *Holland*, 560 U.S. at 649). It explained that, "[t]o count as sufficiently 'extraordinary' to support equitable tolling, the circumstances that caused a litigant's delay must have been beyond its control," *id.* at 10a, and "cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation," *id.* at 11a. Here, the court reasoned, the "Tribe faced no extraordinary circumstances" "because the obstacles the Tribe confronted were ultimately of its own making." *Id.* at 12a.

The court of appeals specifically rejected the Tribe's three arguments for equitable tolling. Pet. App. 2a, 12a-19a. First, the court rejected the Tribe's reliance on its (mistaken) expectation that it would "be a member of the *Cherokee Nation* [putative] class." *Id.* at 13a; see *id.* at 6a. "The flaw in the Tribe's calculations was that it was not eligible to participate in the *Cherokee Nation* [putative] class," and its apparent "belief that it could participate in the *Cherokee Nation* [putative] class without exhausting its administrative remedies was unjustified." *Id.* at 13a-14a. That "miscalculation," the court explained, was not an extraordinary circumstance beyond the Tribe's control. *Id.* at 14a.

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[13] At the Tribe's request, the D.C. Circuit at first held the appeal in abeyance pending the Federal Circuit's resolution of a similar equitable-tolling contention by another tribal entity in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012) (*ASNA II*). 9/28/2012 Order.

Second, the court of appeals rejected the Tribe's contention that the "certainty of failure * * * in bringing its claims * * * stood in its way." Pet. App. 15a. The court explained that "[a] party is not excused from timely filing its claim because the agency's view of the law might be inhospitable." *Ibid.* To the contrary, "[t]he federal courts, not contracting officers, are the final word on federal law," and it was therefore "incumbent upon [the Tribe] to test [its] right and remedy in the available forums." *Id.* at 15a-16a. Given that the "procedure for exhausting administrative remedies is simple," the court added, "[w]hat stood between the Tribe and class-action tolling [as a putative class member in *Cherokee Nation*] was little more than an envelope and a stamp." *Id.* at 17a.

Finally, the court of appeals rejected petitioner's argument that equitable tolling was warranted because of the "breadth and complexity" of the contract-support-costs litigation, observing that, "[i]f a lawsuit's 'breadth and complexity' were an 'extraordinary circumstance,' few statutes of limitations would function." Pet. App. 18a-19a (citation omitted). Accordingly, the court concluded that "none of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims," nor did the circumstances, when viewed together, "jointly amount[] to an 'extraordinary' obstacle."[14] *Id.* at 18a. The court therefore found equitable tolling was unwarranted. *Id.* at 19a.

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[14] Because the court of appeals held that the Tribe failed to identify any "extraordinary circumstances" that prevented it from timely filing a claim, the court did not directly pass on whether the Tribe had satisfied the first prong by diligently pursuing its rights. Pet. App. 12a n.4.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Tribe could not rely on equitable tolling to excuse its failure to file a contract claim within the CDA's six-year limitations period because no "extraordinary circumstance" prevented timely filing. *Holland* v. *Florida*, 560 U.S. 631, 649 (2010).

I. The court of appeals applied the correct legal standard for equitable tolling. As this Court held in *Holland*, a litigant seeking relief must show that (1) it was "pursuing its rights diligently" and (2) "'some extraordinary circumstance stood in [its] way' and prevented timely filing." 560 U.S. at 649 (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Each of these two prongs must be satisfied, and here the court of appeals denied the Tribe's request for equitable tolling because it failed to establish the "extraordinary circumstances" prong.

II. The court of appeals was correct that no extraordinary circumstances justified the Tribe's failure to file its claims within the CDA's six-year limitations period. The Tribe's requests to the contrary are unavailing.

The Tribe contends (Br. 34-38) that it failed to timely file its claims because it relied on its supposed membership in the *Cherokee Nation* putative class action. But the Tribe's failure to present its claims to the contracting officer, in accordance with the CDA's plain terms, meant that it failed to meet the mandatory prerequisite for bringing a judicial action and therefore for membership in the *Cherokee Nation* putative class action. See Pet. App. 13a-14a.

Even after the denial of class certification in *Cherokee Nation*, the Tribe took no action for more than

four years, allegedly resting on its mistaken belief that class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554 (1974), would delay the CDA statute of limitations. Pet. Br. 39-40. Reliance on class-action tolling was unwarranted, however, given the CDA's straightforward terms and well-settled case law holding claim presentment is a mandatory prerequisite to subsequent judicial review of a contract claim against the government. Having rendered itself ineligible for membership in the *Cherokee Nation* putative class, the Tribe could not benefit from class-action tolling during the pendency of the class-certification decision in that case.

The prior *Ramah* class certification decision does not support a contrary conclusion: the Tribe could not reasonably rely on a non-binding, unpublished, interlocutory district court order, which was, in any event, contrary to precedent and distinguishable. The Tribe's mistake regarding its membership in the *Cherokee Nation* putative class and its eligibility for class-action tolling were simply a matter of its own miscalculation, for which equitable tolling is no cure. See *Holland*, 560 U.S. at 651 ("miscalculation" in litigation has never been a basis for equitable tolling).

The absence of extraordinary circumstances warranting equitable tolling is further underscored by the fact that the Tribe could have easily resolved any uncertainty about the claim deadline by complying with the modest procedural requirements before the CDA's statutory deadline expired. See *Pace*, 544 U.S. at 419 ("Had [the litigant] advanced [its] claims within a reasonable time of their availability, [it] would not now be facing any time problem.").

In addition, the Tribe fails to establish that class-action tolling caused its untimeliness because the Tribe delayed presentment until *after* the expiration of the deadline for its earliest-accruing claim that would have applied with full class-action tolling. *Holland* makes clear that the "extraordinary circumstance" must have "*prevented* timely filing." 560 U.S. at 649 (citation omitted; emphasis added); *Neves* v. *Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (per curiam) ("[P]arty seeking equitable tolling must have diligently pursued his rights for the entire period he seeks tolled."), cert. denied, 131 S. Ct. 3025 (2011).

Indeed, the Tribe acknowledges that it was not only aware of the facts necessary for its claim, but that it weighed the "risk and expense" of lodging its own allegations against the government after class-action certification was denied in *Cherokee Nation*, and that it chose instead to wait and monitor the pending tribal contract-support-costs litigation rather than to pursue its own claims. See Pet. Br. 41-48. A litigant may not invoke equitable tolling to ride the tailwinds of existing litigation until this Court "conclusively establish[es]" liability. *Id.* at 39. Rather, "the only sure way to determine whether a suit can be maintained to a successful result is to try it." *Versluis* v. *Town of Haskell*, 154 F.2d 935, 943 (10th Cir. 1946).

III. The absence of diligence demonstrated by the Tribe's years of inaction further disqualifies the Tribe from equitable tolling. The Tribe can point to *no* action that it took to pursue its claims prior to 2005. Instead, the Tribe affirmatively executed an unconditional release of its contract claims. Equitable relief would be particularly inappropriate under such circumstances.

IV. The other factors identified by the Tribe—an asserted absence of prejudice to the government and the special relationship between Indian tribes and the United States—are not, as the Tribe concedes (Br. 49-52), independent grounds for equitable tolling. In any event, the government had no notice of the Tribe's individual claims, especially since the Tribe had affirmatively relinquished them, and equitable tolling would deny the government the central benefit of repose. And the government's special relationship with Indian tribes does not lend support to equitable tolling because Congress specifically made the CDA, with its express requirement for filing a claim within six years, applicable to ISDA contracts.

ARGUMENT

EQUITABLE TOLLING CANNOT BE APPLIED TO EXCUSE THE TRIBE'S FAILURE TO PRESENT ITS CONTRACT DISPUTES ACT CLAIMS BY THE STATUTORY DEADLINE

I. EQUITABLE TOLLING APPLIES ONLY IF THE PARTY "PURSUED ITS RIGHTS DILIGENTLY" AND "SOME EXTRAORDINARY CIRCUMSTANCE" PREVENTED COMPLIANCE WITH THE STATUTE OF LIMITATIONS

Equitable tolling is appropriate "only if" the litigant seeking tolling establishes that it was "pursuing its rights diligently" and that "'some extraordinary circumstance stood in [its] way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Because "the circumstances of a case must be 'extraordinary' before equitable tolling can be applied," *Holland*, 560 U.S. at 652, courts grant equitable toll-

ing only "sparingly," *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). See *Wallace* v. *Kato*, 549 U.S. 384, 396 (2007) ("a rare remedy"). A "garden variety claim of excusable neglect" or a "miscalculation" in litigation has never been a basis for tolling. *Holland*, 560 U.S. at 651 (quoting *Irwin*, 498 U.S. at 96); see *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

The Tribe contends (Br. 30-31) that the court of appeals departed from this Court's articulation of the equitable tolling standard when the court required the Tribe to identify some "external obstacle[]" that prevented it from presenting its claims within the CDA's six-year limitations period. See Pet. App. 12a, 18a. The Tribe is incorrect. The requirement of an external obstacle is reflected in the canonical formulation of the "extraordinary circumstance" test, which demands that the litigant seeking tolling establish that "'some extraordinary circumstance stood in [its] way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). That formulation would make little sense if equitable tolling were available when a competent litigant was responsible for its *own* delay. As the court of appeals explained, an extraordinary circumstance that could have "stood in [the party's] way" (*i.e.*, interposed an obstacle or impediment) so as to "prevent" the party from timely filing its claim logically requires circumstances beyond the party's control. Pet. App. 10a; see *Maples* v. *Thomas*, 132 S. Ct. 912, 923 (2012); Pet. App. 11a ("The circumstance that stood in a litigant's way cannot be a product of that litigant's own misunderstand-

ing of the law or tactical mistakes in litigation.").[15] Thus the court of appeals' reference to an "external obstacle[ ]" was nothing more than a restatement of *Holland*'s precepts.

The standard applied by the court of appeals was nothing like the "rigid *per se* approach," Pet. Br. 33, rejected by this Court in *Holland*, where the Eleventh Circuit had categorically held that an attorney's unprofessional conduct, short of bad faith, divided loyalty, or like behavior, could never constitute an "extraordinary circumstance." See 560 U.S. at 649, 651. The court of appeals assessed the circumstances identified by the Tribe, individually and collectively, before concluding that it was "the Tribe's inadequate responses to relatively routine legal events," rather than "external obstacles," that "caused it to delay pursuing its claims." Pet. App. 12a.

There is also no merit to the Tribe's argument (Br. 26-30) that the court of appeals erred because it declined to address "whether the Tribe had exercised reasonable diligence." Although the Tribe asserts that "[t]he two components of the *Holland* test" are not distinct factors "to be applied separately," Br. 27,

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[15] Other circuit decisions have similarly and uniformly limited the circumstances warranting equitable tolling to those involving impediments beyond a litigant's control. See, *e.g.*, *Tucker* v. *Kingston*, 538 F.3d 732, 734-735 (7th Cir. 2008); *Downs* v. *McNeil*, 520 F.3d 1311, 1324-1325 (11th Cir. 2008); *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), cert. denied, 534 U.S. 863 (2001); *Harris* v. *Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000); *Alvarez-Machain* v. *United States*, 107 F.3d 696, 700-701 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997). Cf. *Smith* v. *Johnson*, 247 F.3d 240, 2001 WL 43520, at *3 (5th Cir. Jan. 3, 2001) (per curiam) (Tbl.) (recognizing tolling where defendant's mental "incompetence impeded him from asserting his legal rights").

this Court has made clear that a litigant seeking equitable tolling must "establish[] [the] two elements" of that test, *Pace*, 544 U.S. at 418. This Court has thus rejected requests for equitable tolling where the litigant failed to meet one of the two *Holland* components, without addressing whether the litigant satisfied the other. See, *e.g.*, *Lawrence*, 549 U.S. at 336-337 (rejecting equitable tolling without addressing diligence because the habeas petitioner fell "far short of showing 'extraordinary circumstances'"); *Pace*, 544 U.S. at 418 (noting without resolving the litigant's argument that he had "satisfied the extraordinary circumstance test" and holding that, "[e]ven if [the Court] were to accept [his argument], he would not be entitled to relief because he has not established the requisite diligence").

In any event, the court of appeals did consider the issue of the Tribe's diligence—more precisely, its lack of diligence—in the course of assessing the circumstances that the Tribe contends led it to file untimely claims. See Pet. App. 19a ("Faced with a variety of reasonable litigation options, the * * * Tribe chose to wait and see if more favorable law would appear."); see also *id.* at 15a-17a (explaining ways in which the Tribe could have successfully pursued its claims). The court further considered whether the Tribe's circumstances "jointly amount[ed] to an 'extraordinary' obstacle," and concluded that, even when viewed together, the Tribe failed to meet the standard for equitable relief. *Id.* at 18a-19a. See Part III, *infra*.

The court of appeals therefore correctly articulated the standard for equitable tolling in a manner fully consistent with this Court's formulation in *Holland*.

II. NO "EXTRAORDINARY CIRCUMSTANCE" STOOD IN THE TRIBE'S WAY AND PREVENTED IT FROM TIMELY FILING ITS CDA CLAIMS

The court of appeals correctly held that equitable tolling was unwarranted because the "tactical mistakes" identified by the Tribe—including its reliance on the pendency of the *Cherokee Nation* putative class action and its miscalculation regarding its eligibility for class-action tolling—were not extraordinary circumstances that stood in its way, but rather "obstacles * * * of its own making." Pet. App. 12a. Nor do concerns about the "[r]isk and expense" of subsequent litigation or any uncertainty in the substantive law constitute grounds for equitable tolling. Pet. Br. 41-46 (emphasis omitted).

Moreover, the district court in *Cherokee Nation* denied class certification *in 2001*, almost two years before the deadline for presenting the Tribe's claim for the first of the three years at issue. Yet the Tribe waited more than four years after 2001 to file its claims with IHS. These circumstances furnish no basis for equitable tolling.

A. The Pendency Of The *Cherokee Nation* Putative Class Action Did Not Prevent The Tribe From Filing Timely CDA Claims

The Tribe asserts (Br. 35-36) that equitable tolling is appropriate because it "rel[ied] on the [*Cherokee Nation* putative] class action as a means of pursuing its claims" and "believed there was no need to pursue separate litigation" when the Tribe was "*already* participating in litigation as a member of the [*Cherokee Nation* putative] class," Br. 36, 39.

That argument fails for the simple reason that the Tribe never took the steps necessary to make itself

eligible for membership in the putative class in *Cherokee Nation*. Regardless of whether the Tribe could have pursued its claims through a class action at the *litigation* stage, the CDA unambiguously required the Tribe to first present claims to the IHS contracting officer. See pp. 29-36, *infra*. The Tribe could not refrain from fulfilling that basic administrative prerequisite simply because other tribes "were already litigating the same issues in several federal courts." Pet. Br. 39 (emphasis omitted).

Moreover, certification of the *Cherokee Nation* class was denied on February 9, 2001—almost two years before the deadline for presenting the Tribe's 1996 claim (December 31, 2002)—leaving ample time for the Tribe to file its claims with the IHS contracting officer. See *Cherokee Nation* v. *United States*, 199 F.R.D. 357 (E.D. Okla. 2001). Once class certification was denied in *Cherokee Nation*, the Tribe certainly knew that it had to pursue its claims on its own. It is hardly equitable to allow the Tribe to rely on the limited pendency of the *Cherokee Nation* putative class action prior to 2001 as a basis for tolling all the way until September 2005, when it filed its claims. See *Harper* v. *Ercole*, 648 F.3d 132, 137-138 (2d Cir. 2011) (where the alleged impediment to filing "arose and concluded early within the limitations period[,] * * * a diligent petitioner would likely have no need for equity to intervene to file within the time remaining to him"); *Neves* v. *Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (per curiam) ("[P]arty seeking equitable tolling must have diligently pursued his rights for the entire period he seeks tolled."), cert. denied, 131 S. Ct. 3025 (2011). The district court's rationale for denying class certification in *Cherokee Nation*, which emphasized each

tribe's interest in pursuing its own individual claims in court, only underscored that point. 199 F.R.D. at 365 ("[E]ach tribe has a great interest in *individual litigation* to aggressively protect and defend [its] interest under [its] individual contracts.") (emphasis added).

B. The Tribe's Mistaken Belief That It Could Benefit From Class-Action Tolling Did Not Warrant Equitable Tolling For Its Four-Year Delay In Filing A Claim Following The Denial Of Class Certification In *Cherokee Nation*

The Tribe seeks to justify its failure to act after the denial of class certification in *Cherokee Nation* by making the further argument that it reasonably assumed that class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), would extend the CDA's statute of limitations by the nearly two years (707 days) that the *Cherokee Nation* putative class action had been pending. Any such reliance on class-action tolling was misplaced. It has long been settled that claim presentment is a mandatory prerequisite to federal court jurisdiction. Having failed to present its claims to the IHS contracting officer, the Tribe thus lacked a reasonable basis for believing it could rely on the pendency of the *Cherokee Nation* class certification motion to toll the CDA deadline. Indeed, further delay beyond the CDA's six-year deadline was particularly unreasonable considering the ample time remaining for filing after the *Cherokee Nation* class-certification denial and the ease with which the filing requirement could have been satisfied. And in all events, the Tribe's own legal or tactical error does not constitute an extraordinary

circumstance—an external impediment—that could justify equitable tolling.

1. By failing to present an administrative claim to the IHS contracting officer, the Tribe failed to satisfy a basic prerequisite to class membership, and thus could not benefit from class-action tolling

The Tribe does not challenge the court of appeals' determination that, by failing to timely present its administrative claims, it could not properly be a member of the putative *Cherokee Nation* class. See Pet. App. 56a. Nor does the Tribe dispute that, as a result, the CDA statute of limitations was not in fact subject to class-action tolling under *American Pipe* during the pendency of the *Cherokee Nation* class-certification proceedings, as the D.C. Circuit concluded in its first decision in this case. See Pet. App. 44a-68a. The Federal Circuit likewise had earlier rejected class-action tolling on the same ground in *Artic Slope Native Ass'n* v. *Sebelius*, 583 F.3d 785 (2009) (*ASNA I*), cert. denied, 561 U.S. 1026 and 562 U.S. 835 (2010).

The Tribe nonetheless contends that it is entitled to invoke equitable tolling because those decisions constituted a "change in the law governing presentment in the tribal contract support context," that upended its reasonable expectations. Br. 36-37. That argument lacks merit. Longstanding and uniform appellate precedent made clear that presentment of a CDA claim to a contracting officer was a prerequisite to invocation of federal court jurisdiction and, therefore, to membership in a class action challenging contract performance.

The straightforward terms of the CDA establish that any contract dispute must begin with the presentment of a written claim to the contracting officer.

41 U.S.C. 7103(a). The CDA then provides clear step-by-step instructions for judicial review of a contracting officer's decision and, no matter which route is chosen, the process of reaching federal court must begin with submission of a claim to the contracting officer and issuance of the officer's final decision. See 41 U.S.C. 7104(a) (appeal to agency board), 7104(b) (contractor may bring an action directly on the claim in the CFC "in lieu of" appealing to the agency board), 7107(a)(1) (contractor may appeal contracting officer's decision to agency board and then to the Federal Circuit); see also 41 U.S.C. 7103(d)-(f) (issuance of a contracting officer's final decision); see also *A.E. Finley & Assocs.* v. *United States*, 898 F.2d 1165, 1168 (6th Cir. 1990) (per curiam) (under the CDA, "[t]he first step in the process is for * * * the contractor * * * to make a 'claim'"). Claim presentment is also a prerequisite to the jurisdiction of a federal district court to entertain a CDA action under ISDA, since ISDA subjects the district court's jurisdiction to the mandatory application of the CDA and further provides that such jurisdiction is "concurrent with the [CFC]." 25 U.S.C. 450m-1(a) and (d).

The courts of appeals have applied the CDA's clear terms to uniformly hold that presentment of an administrative claim is a jurisdictional prerequisite to review in federal court. See, *e.g.*, *England* v. *Swanson Grp.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *James M. Ellett Constr. Co.* v. *United States*, 93 F.3d 1537, 1541-1542 (Fed. Cir. 1996); *Bath Iron Works Corp.* v. *United States*, 20 F.3d 1567, 1578 (Fed. Cir. 1994); *Newport News Shipbuilding & Dry Dock Co.* v. *Garrett*, 6 F.3d 1547, 1561-1562 (Fed. Cir. 1993) (citing cases); *United States* v. *Grumman Aerospace Corp.*, 927 F.2d

575, 579-580 (Fed. Cir.), cert. denied, 502 U.S. 919 (1991); see also *Made in the USA Found.* v. *United States*, 51 Fed. Cl. 252, 254 (2001) ("[J]urisdiction under the CDA is predicated" on the contractor's "submission of a written claim" and the "agency's issuance of a final decision."). This presentment rule was not only binding law in the Federal Circuit, which has appellate jurisdiction over CDA claims generally, but also was the rule in the D.C. Circuit, where the Tribe brought its ISDA claims. See *A & S Council Oil Co.* v. *Lader*, 56 F.3d 234, 236, 242 (D.C. Cir. 1995) (directing dismissal of plaintiff's CDA claims rather than transferring them to the CFC because judicial review is unavailable where plaintiffs "failed to exhaust the jurisdictional remedies required for relief under the CDA"); see also *Diversified Energy, Inc.* v. *Tennessee Valley Auth.*, 339 F.3d 437, 444 (6th Cir. 2003) (CDA presentment requirement is "jurisdictional in nature; a failure to satisfy it will preclude the district court from entertaining an appeal of the contractor's claims").[16]

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[16] The structure and legislative history of the CDA confirm that claim presentment is a jurisdictional prerequisite to federal court review. In 1992, Congress, in a section entitled "Jurisdiction," amended the CDA to overrule the Federal Circuit's holding that the sworn certification of a claim to the contracting officer was also jurisdictional, but Congress left the basic presentment requirement intact. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(a)(1), 106 Stat. 4518 (41 U.S.C. 7103(b)(3)) ("A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim."); see also H.R. Rep. No. 1006, 102d Cong., 2d Sess. Pt. 1, at 28 (1992) (citing Federal Circuit cases that held absence of certified claim deprived court of jurisdiction). Significantly, Congress did not then or since overturn the court of appeals' longstanding

Finally, it was well settled that where presentment of an administrative claim is a prerequisite to suit, a class action cannot encompass claimants who failed to satisfy that requirement. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 703-704 (1979) (class certification including putative members who failed to file administrative claims was "plainly too broad"); *Weinberger* v. *Salfi*, 422 U.S. 749, 763-764 (1975) (district court lacked jurisdiction over social security benefits class action where complaint failed to allege class members filed administrative claim); see also *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194, 198 (2d Cir. 1987) (district court lacked jurisdiction over asserted class members who did not comply with presentment requirement under Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*); *Lunsford* v. *United States*, 570 F.2d 221, 224-227 (8th Cir. 1977) (class action can be maintained under FTCA only if each putative member has individually satisfied all jurisdictional requirements). As a result, the Tribe could not rely upon the prospect of class-action tolling to delay filing its administrative claim until after the six-year CDA limitations period had expired. See *American Pipe*, 414 U.S. at 554 (1974) (class-action tolling available only to "all asserted members of the class *who would have been parties* had the suit been permitted to continue as a class action") (emphasis added). Nor can it claim

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rule that the presentment of the claim is a jurisdictional prerequisite to suit. See *Texas Dep't of Hous. & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("If a word or phrase has been . given a uniform interpretation by inferior courts . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.") (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012)).

now that its mistaken reliance warrants *equitable* tolling.

Courts have recognized only limited exceptions to the rule that individual claimants must meet all administrative prerequisites before qualifying as class members. For example, in *Bowen* v. *City of New York*, 476 U.S. 467, 484-485 (1986), this Court permitted social security claimants who challenged a "systemwide, unrevealed policy" to participate in a class action without full exhaustion of their administrative remedies. Even then, the Court reaffirmed that *presentment* of a claim in the first place *was* a jurisdictional prerequisite to suit. See *id* at 483; see also *Mathews* v. *Eldridge*, 424 U.S. 319, 330-331 (1976) (allowing individual due process challenge to proceed following presentment notwithstanding plaintiff's failure to fully exhaust administrative remedies because (1) the constitutional claim was "entirely collateral to [plaintiff's] substantive claim of entitlement," and (2) irreparable harm would result from requiring full exhaustion of remedies). The Tribe's suit, which seeks performance on particular ISDA contracts, is not in any event analogous to the circumstances in *Mathews* or *Bowen*.[17]

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[17] In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court held that individuals who had not filed charges with the Equal Employment Opportunity Commission could nonetheless be considered class members in a suit against a private employer under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* That ruling was based on specific features of Title VII's remedial scheme and the legislative history. See 422 U.S. at 414 n.8. The CDA, by contrast, makes claim presentment mandatory, and, further, it shares none of the remedial statutory features of Title VII. See Pet. App. 56a-57a; *ASNA I*, 583 F.3d at 795-796.

Holding the Tribe to the statutory deadline also makes sense considering that the purpose of class-action tolling is to alleviate the "uncertainty of putative class members regarding whether the court will certify a class." Pet. App. 59a. In the absence of class-action tolling, putative class members who could sue on their own would face the choice of either filing protective motions to intervene or risking forfeiture of their rights if class certification were denied after the statute of limitations had expired. *Id.* at 58a-59a; see *ASNA I*, 583 F.3d at 797 ("[T]he main point of class action tolling * * * is to provide protection against the running of the statute of limitations for parties who could potentially be included as class members[,] * * * but who are ultimately left outside the class."); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 (1983) (class-action tolling allows "class members" "to rely on the existence of the suit to protect their rights"). But for a mandatory precondition (like presentment) to *any* suit the calculus is different: "Regardless of whether [class] certification is granted, *every contractor must submit its claim* to the contracting officer," and only after a contracting officer's denial of that claim "does the contractor have a choice between participating in the class or proceeding individually." Pet. App. 59a (emphasis added). It was therefore irrelevant whether the Tribe sought to pursue its claims individually or by class participation; either way, timely presentment of a claim to IHS was the necessary first step.

For these reasons, the court of appeals was correct in concluding on the prior appeal that Rule 23's objectives of "efficiency and economy of litigation" would be disserved by application of class-action tolling to par-

ties who had not satisfied the mandatory administrative prerequisites to suit. Pet. App. 60a (quoting *American Pipe*, 414 U.S. at 553). Extension of class-action tolling to such parties would "invit[e] abuse" by encouraging lawyers "to frame their pleadings . . . [to] save members of the purported class who have slept on their rights." *Id.* at 61a (brackets in original) (quoting *Crown, Cork & Seal Co.*, 462 U.S. at 354 (Powell, J., concurring)). Substitution of equitable tolling for class-action tolling, as the Tribe now attempts here, would pose the same risk of abuse.

For similar reasons, the Tribe's characterization (Br. 37) of the *Cherokee Nation* putative class action as a "defective pleading" is misguided. See *Irwin*, 498 U.S. at 96 (noting that equitable tolling may be available "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period"). It was not a flaw in the *Cherokee Nation* pleadings that barred the Tribe from membership in the putative class; the Tribe was excluded from the *Cherokee Nation* putative class by virtue of its own failure to submit a timely claim with the contracting officer. See Pet. App. 55a-57a.

The ineligibility of the Tribe for membership in the putative class in *Cherokee Nation* was thus compelled by settled law, and the resulting inapplicability of class-action tolling flowed from that determination. And as noted above, petitioner does not challenge the court of appeals' holding that class-action tolling was unavailable here. It follows that equitable tolling was likewise unavailable—for much the same reason. By waiting until after the expiration of the CDA limitations period to file its administrative claims, the Tribe simply made its own miscalculation, which does not

constitute an extraordinary circumstance warranting equitable tolling under *Holland*.

2. Neither the* Ramah *class action, nor any special features of ISDA contract-support-costs litigation, constituted an extraordinary circumstance exempting the Tribe from timely satisfying the CDA's presentment requirement

The Tribe attempts to circumvent the well-established presentment rule by claiming reliance on the district court's unpublished class certification opinion and order in *Ramah*. See *Ramah Navajo Chapter* v. *Lujan*, No. 90-cv-957 (D.N.M. Oct. 1, 1993) (J.A. 35-39). The Tribe contends that at the time it was issued, the *Ramah* order was the "only ruling addressing class certification in the context of the tribal contract support costs claims" and that it "confirmed that [the Tribe] could rely on the class action" and class-action tolling without satisfaction of the CDA's presentment requirement. Pet. Br. 35-36. But the Tribe advances no reasonable basis for distinguishing tribal contract-support-costs litigation from the long line of controlling authority, see pp. 30-31, *supra*, requiring presentment of contract disputes through the filing of a claim with the contracting officer.

As a threshold matter, the *Ramah* class certification order was an extremely thin reed on which to rely. It was an unpublished, interlocutory district court decision with little legal significance outside the confines of that particular litigation. It is axiomatic that a "decision by a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta* v. *Greene*, 131 S.

Ct. 2020, 2033 n.7 (2011) (citation omitted). A litigant that chooses to rely on a non-precedential district court ruling does so at its own hazard. Any such reliance was particularly misplaced here, where the ruling contradicted long-established appellate precedent holding that presentment of a claim is a jurisdictional prerequisite to suit, and to decisions of this Court and others holding that the failure to satisfy such a prerequisite bars membership in a class action. See *Pueblo of Zuni* v. *United States*, 467 F. Supp. 2d 1099, 1144 (D.N.M. 2006) (tribal plaintiff "can hardly be said to rely on the oblique argument that a class certification order in a *separate* case allows [it] to forgo exhaustion of [its] claims in *this* case").[18]

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[18] Similarly, no significance should be attached to the letter from class counsel in *Cherokee Nation* to tribal leaders stating that the filing of the putative class action "ha[d] the effect of stopping the running of any statute of limitations against individual tribes eligible for membership in the class." J.A. 34. To the extent that the Tribe detrimentally relied on this letter, such a "'garden variety claim' of attorney negligence" is no basis for tolling, *Holland*, 560 U.S. at 652 (quoting *Irwin*, 498 U.S. at 96), particularly considering that the advice was sent by class counsel, who did not individually represent the Tribe at the pre-class-certification stage of the litigation, see Comm. on Ethics and Prof'l Responsibility, American Bar Ass'n, *Formal Op. 07-445: Contact by Counsel with Putative Members of Class Prior to Class Certification* (Apr. 11, 2007). In any event, class counsel's statement was limited to those "individual tribes eligible for membership in the class," and the letter cautioned that "it will be up to the federal court to decide whether the case can proceed in this manner." J.A. 34. As noted, the Tribe rendered itself ineligible for class membership by consciously deciding to delay submission of its claims to the contracting officer. And while class counsel's letter said that the filing of the class action would stop the running of any statute of limitations against eligible tribes, it did not say that a tribe could continue to

Moreover, the *Ramah* class certification order itself should have put the Tribe on notice that presentment of claims was a necessary step to suit in federal court. The district court in *Ramah*, after surveying the case law, found it "*clear* that when a government contractor wishes to seek relief in connection with the performance of his contract, *he must first submit a claim to the agency contracting officer* and receive an opinion from that official," and that the "completion of these steps is a jurisdictional prerequisite" to suit under the CDA. See J.A. 37-38 (emphases added).

The district court's decision in *Ramah* to certify the class also was not based on some inherent feature of all CDA litigation or, as the Tribe contends (Br. 35), on "unique features of the contract support litigation." Rather, the court certified the *Ramah* class, notwithstanding putative class members' failure to present their claims, because it found the allegations "d[id] not concern a typical contract dispute wherein issues of performance need be addressed," J.A. 38, but rather challenged "the [BIA's] policies and practices" and sought "to make systemwide reforms," J.A. 39.[19]

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delay filing a claim if class certification was denied—as the Tribe later did for more than four years.

[19] The *Ramah* opinion also was thinly reasoned and unpersuasive even in that context. In support of its conclusion that presentment of claims was unnecessary for class certification, the district court cited only one decision, *Association for Community Living in Colorado* v. *Romer*, 992 F.2d 1040 (10th Cir. 1993), which recognized certain exceptions to the exhaustion requirement for claims brought against non-federal-government defendants under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* These exceptions were specific to IDEA's own statutory scheme. See 992 F.2d at 1044. IDEA bears little resemblance to the CDA, which establishes a mandatory administrative procedure

By contrast, it was the tribes' challenge to performance under their individual contracts that led the court to deny class certification in *Cherokee Nation*. 199 F.R.D. at 363-365. When the Tribe ultimately presented its untimely claims to the contracting officer in September 2005, it too alleged deficient contract performance. See Lodged Materials 1-10.[20] For these reasons, any reliance on the *Ramah* class certification order was unjustified. And again, the Tribe's own mistaken reliance on the *Ramah* class certification order did not "prevent" it from making a timely

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to resolve all contracting disputes with the federal government. See H.R. Rep. No. 1556, 95th Cong., 2d Sess. 6 (1978); see also *Zuni*, 467 F. Supp. 2d at 1113 ("The plain statutory language of the CDA and case law interpreting the provision does [sic] not appear to provide the same flexibility" as IDEA.).

[20] The Federal Circuit in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012) (*ASNA II*) (Pet. App. 75a-97a), determined that, notwithstanding ASNA's failure to present its claims, ASNA, a consortium of tribes, could reasonably rely on the *Ramah* class certification to believe it could be a member of the *Zuni* putative class action, which was pending in the same judicial district and before the same district judge as *Ramah*. Pet. App. 89a-90a. But as Judge Bryson's dissent in *ASNA II* persuasively demonstrated, the *ASNA II* majority was incorrect. Even though the *Zuni* putative class action was pending before the same district judge who decided *Ramah*, "a reasonably diligent party would have inferred that *Zuni* was not likely to proceed in the same manner as *Ramah*": "*Ramah* was a different case with different claims," *id.* at 95a; "the judge in *Ramah* was operating under a different statutory framework" because the CDA was subsequently amended, after the *Ramah* class certification decision, to add the six-year limitations period, *ibid.*; and additional developments, including the denial of class certification in *Cherokee Nation*, indicated that "the *Ramah* certification may have been questionable," *id.* at 93a-94a. The Tribe should have been aware of these same considerations.

filing and therefore is not an extraordinary circumstance warranting equitable tolling.

3. The Tribe cannot establish that its reliance on class-action tolling caused its failure to meet the CDA deadline

The Tribe's equitable tolling argument is further undermined by the fact that the Tribe did not peg its late filing of an administrative claim to the supposed class-action tolling of the statutory deadline; rather, the Tribe waited an additional *274 days* past when its 1996 claim would have been due if that six-year period were extended by the entire time the *Cherokee Nation* putative class action had been pending.[21]

Equitable tolling is available only where the alleged "extraordinary circumstances" *caused* the party to miss its deadline. *Holland*, 560 U.S. at 649 ("extraordinary circumstances" must have "*prevented* timely filing") (emphasis added); see *Valverde* v. *Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (explaining need for a "causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of [the] filing"); *Harper*, 648 F.3d at 137 ("[I]t is not enough for a party to show that he experienced extraordinary circumstances. He must further demonstrate that those circumstances caused him to miss the original filing deadline."). The Tribe's additional delay beyond even the deadline that

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[21] The Tribe filed its claims on September 7, 2005—981 days after the expiration of the 1996 claim's deadline of December 31, 2002. The *Cherokee Nation* putative class action was pending between March 5, 1999, and February 9, 2001—or 707 days—meaning that the Tribe waited an additional 274 days beyond the deadline for its earliest accruing claim if the full 707 days were added to the CDA's six-year limitations period.

would have applied with full class-action tolling substantially undermines its present contention that reliance on the prospect of class-action tolling lulled it into inaction after class certification was denied in *Cherokee Nation*. The Tribe acknowledges as much (Br. 39), stating that, "rather than immediately file" its own claims, it "chose to monitor the pending litigation to see whether liability would be conclusively established" against the government.

C. Perceived Futility Does Not Excuse The Failure To Present A Claim, And Presentment Was Not In Any Event Futile Here

Acknowledging that the limited period the putative class action in *Cherokee Nation* had been pending would be insufficient to warrant equitable tolling for more than four years after class certification was denied, the Tribe contends (Br. 38-40) that equitable tolling should excuse any additional delay because it believed that IHS "would almost certainly deny the Tribe's claims." The Tribe, therefore, posits that it should not have been required to incur the "[r]isk and expense" of pursuing its own individual claims, see Br. 41-46 (emphasis omitted), but rather could wait until "the [g]overnment's liability was established by this Court in *Cherokee*," Br. 25. See Br. 48 (Tribe chose to "monitor existing litigation to see whether there was even any basis for its claims * * * before committing itself and the [g]overnment to further litigation."). Adopting the Tribe's position would establish an unprecedented rule allowing a litigant to ride the coattails of existing litigation and excuse its untimeliness on an open-ended basis until after the validity of its claim was conclusively established.

The court of appeals correctly dismissed the Tribe's arguments as meritless, holding that the Tribe was required to meet the statutory deadlines even if it "doubted the viability of its arguments." Pet. App. 16a. Such ordinary litigation risks do not excuse a litigant from timely pursuit of its claims. See *Boling* v. *United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000) (finding "no authority which would suggest that the presence of adverse precedent automatically leads to equitable tolling."); *Thoen* v. *United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985) (rejecting argument that presentment of a certified claim should be excused because it "would be a useless act"); see also *Weinberger*, 422 U.S. at 766 (holding that a "statutorily specified jurisdictional prerequisite" "may not be dispensed with merely by a judicial conclusion of futility").

The Tribe's futility allegations are particularly weak here, because other tribes had already met with success in contract-support-costs litigation. Indeed, in its September 2005 claim presented to IHS, the Tribe expressly relied on the 1997 Tenth Circuit decision in *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, which applying the version of ISDA in effect at that time, recognized the *validity* of the Tribe's miscalculation theory against Interior, and which, on remand, led to a substantial settlement with BIA in the Tribes' favor. See Lodged Materials 2, 5, 8 (alleging that IHS "miscalculated the amount of indirect costs * * * by employing the same method * * * declared illegal in the *Ramah Navajo* case"); see also Pet App. 8a. Similarly, in 1999, in the *Cherokee Nation* administrative appeal, the IBCA recognized the validity of shortfall claims analogous to those later raised in the Tribe's

claims, see *Appeals of Cherokee Nation*, No. 3877, 1999 WL 440045 (IBCA June 30, 1999), aff'd on reconsideration, *Appeals of Cherokee Nation*, No. 4000/98, 2001 WL 283245 (IBCA Mar. 21, 2001), and the Federal Circuit affirmed that decision in 2003, *Thompson* v. *Cherokee Nation*, 334 F.3d 1075. See Lodged Materials 2, 5, 8. At the same time, the district court in the other *Cherokee Nation* proceeding recognized the distinct nature of each contract when refusing to certify a class, further demonstrating the need for the Tribe to present its specific contract claims. See 199 F.R.D. at 363. The Tribe can hardly cite the "futility" of its claims where it had at least two potentially receptive Circuits, a positive decision from the IBCA to support its claims, and a district court decision emphasizing the individual nature of each contract. And, although the *Cherokee Nation* district court denied similar (but not identical) claims in 2001, until 2002, no court of appeals had rejected claims like the Tribe's. See Pet. App. 16a.

The Tribe, moreover, acknowledges that it delayed, not because the process of administrative and judicial review was actually *futile*, but because it wanted *certainty* that its claims would ultimately prevail. See Pet. App. 100a (Wakau Decl. ¶ 9). Only once the Tribe received "confirmation that its claims were viable" through this Court's *Cherokee Nation* decision did the Tribe take any action on its claims. *Id.* at 100a-101a.

The existence of some adverse precedent cannot allow a litigant to evade statutory time limits while it takes no action, waiting to see if this Court will "conclusively establish[]" the viability of its legal theories. See *Whiteside* v. *United States*, 775 F.3d 180, 186 (4th Cir. 2014) (en banc) ("Equitable tolling * * * may

not be applied where * * * the only impediment to timely filing was the discouragement felt by petitioner when calculating his odds of success."), cert. denied, 135 S. Ct. 2890 (2015). To the contrary, courts have long recognized that "[t]he only sure way to determine whether a suit can be maintained is to try it," and "a suitor cannot toll or suspend the running of the statute by relying upon the uncertainties of controlling law." *Communications Vending Corp. of Ariz.* v. *Federal Communications Comm'n*, 365 F.3d 1064, 1075 (D.C. Cir. 2004) (quoting *Fiesel* v. *Board of Educ.*, 675 F.2d 522, 524-525 (2d Cir. 1982)). A litigant must instead "test his right and remedy in the available forums" rather than wait until "through the labor of others the way was made clear." *Ibid.* By choosing to wait for the outcome in *Cherokee Nation* in this Court, the Tribe did exactly what this rule proscribes.

D. The Risks And Costs Of Subsequent Litigation Cannot Support Equitable Tolling Of The Claim-Presentment Deadline

The Tribe next asserts that its "lack of financial resources" "stood in the way" of its "filing a claim prior to this Court's ruling in *Cherokee*" and that the court of appeals failed to properly evaluate the "[r]isk and expense of filing individual claims." Pet. Br. 41-46 (emphasis omitted).

If the costs of potential litigation permitted a party to ignore statutory deadlines, tolling would become the rule, not the exception. See Pet. App. 18a ("If a lawsuit's 'breadth and complexity' were an 'extraordinary circumstance,' few statutes of limitations would function."); *id.* at 34a ("[I]t is common for a litigant to be confronted with significant costs to litigation, limited financial resources, and uncertain outcome based

upon an uncertain legal landscape, and impending deadlines. These circumstances are not 'extraordinary.'"). The Tribe points to nothing about the costs of filing its two-to-three page claims with the contracting officer, or even about the prospect of subsequent litigation, that would bring this case outside the norm—much less be such a dramatic departure that it could properly be regarded as an "extraordinary circumstance"—assuming *arguendo* that potential risk and expense of litigation could ever warrant equitable tolling. By waiting to file its claims, moreover, the Tribe only deferred, but did not avoid, the cost of claim submission and ensuing litigation, while having forfeited, by virtue of its untimeliness, any potential benefit from success on the merits.

The fee- and cost-shifting provisions of the Equal Access to Justice Act (EAJA), 5 U.S.C. 504; 28 U.S.C. 2412, further refute any argument that the potential expense of litigation justified the Tribe's untimely presentment of an administrative claim. By making EAJA applicable to qualifying administrative appeals of ISDA claims, Congress directly addressed any concerns about the cost of submitting ISDA contract claims to the government. See 25 U.S.C. 450m-1(c); see also Senate Report 36-38 (amendments making EAJA applicable and adopting related fee-shifting rules for qualifying ISDA contracts were intended "to give self-determination contractors viable remedies for compelling BIA and IHS compliance with [ISDA]"). Especially since Congress expressly addressed cost concerns by statute, there is no basis for the courts to impose tolling on the view that it would be more equitable to do so. See *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001)

("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.").

III. THE TRIBE FAILED TO DEMONSTRATE REASONABLE DILIGENCE IN THE PURSUIT OF ITS CLAIMS

The Tribe asserts (Br. 27-28) that the court of appeals erred by failing to consider its circumstances "in light of" its supposed diligence. But *Holland*'s diligence prong is of no assistance to the Tribe. "The litigant seeking equitable tolling bears the burden" of establishing both prongs of the equitable tolling standard." *Pace*, 544 U.S. at 418. Failure to establish "extraordinary circumstances" is thus fatal to the Tribe's argument. In any event, the Tribe could not possibly satisfy the "reasonable diligence" argument. Here the Tribe can point to *no* action taken to pursue its claims prior to its CDA deadlines, other than "monitor[ing] existing litigation" (Br. 48).

Indeed, the only affirmative act that the Tribe took in relation to the 1996-1998 contracts during the CDA's six-year period was to *relinquish* its claims by executing an unequivocal contractual release for all three years. J.A. 104, 240-242. The execution of the contract release should itself bar the Tribe from recovery, and *a fortiori* from equitable tolling of its claims-filing deadlines. See *Alliance Oil & Ref. Co.* v. *United States*, 856 F.2d 201, 1988 WL 82705, at *1 (Fed. Cir. Aug. 11, 1988) (per curiam) (Tbl.) ("A contractor who executes an unconditional general release and fails to exercise his right to reserve claims is barred from maintaining a suit for damages or additional compensation under the contract based on events that occurred prior to the execution of the release."); *Mingus Constructors, Inc.* v. *United States*, 812 F.2d 1387, 1389, 1391 (Fed. Cir. 1987).

All the relevant facts were in the Tribe's possession from the beginning of the statutory period. Nor does the Tribe dispute the simplicity of the claim-filing process, Br. 41, which involves only submission of a letter or "short written statement outlining the basis of the claim, estimating damages, and requesting a final decision." Pet. App. 4a; see 25 C.F.R. 900.218. The brief letters eventually filed by the Tribe in this case illustrate the modest procedural requirements at issue. See Lodged Materials 1-10.

Considering the relative ease of the claim procedures, moreover, any uncertainty about the filing deadline could have been readily resolved if the Tribe took the basic steps necessary to preserve its claims within the statutory period. See Pet. App. 96a (*Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) (*ASNA II*)) (Bryson, J., dissenting) ("[A] prudent course would have been for [the Tribe] to prepare and submit the letters prior to the expiration of its claims."); *Fisher* v. *Johnson*, 174 F.3d 710, 716 (5th Cir. 1999) ("[E]quity does not require tolling" "absent a showing that [the litigant] diligently pursued his application" during the time remaining in the statute of limitations and "still could not complete it on time."), cert. denied, 531 U.S. 1164 (2001); see also *Wion* v. *Quarterman*, 567 F.3d 146, 149 (5th Cir. 2009) ("Even where * * * the applicable law is unclear or unsettled, * * * [t]he petitioner should 'err on the side of caution and file [the] petition within the most conservative of possible deadlines.'") (second set of brackets in original) (quoting *Fierro* v. *Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002), cert. denied, 538 U.S. 947 (2003)), cert. denied, 558 U.S. 1116 (2010); *United States* v. *Marcello*, 212 F.3d 1005, 1010 (7th Cir.)

("The [litigants'] argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest."), cert. denied, 531 U.S. 878 (2000).

The Tribe failed to meet the CDA deadline, even though it knew that it must pursue its claims individually when certification of the *Cherokee Nation* putative class action was denied, which was almost two years before the expiration of the limitations period for the earliest of its claims. The Tribe nevertheless delayed presentment of its claims for over four more years. That delay stands in stark contrast to the persistent diligence exercised by the petitioner in *Holland*, who prepared and promptly filed his own pro se habeas petition "the *very day* that [he] discovered that his AEDPA clock had expired due to [his attorney's] failings." 560 U.S. at 653 (emphasis added).

The Tribe's position is instead analogous to that of the petitioner in *Pace*, *supra*, who "waited years, without any valid justification, to assert" his claims. 544 U.S. at 419. As in *Pace*, had the Tribe only "advanced [its] claims within a reasonable time of their availability, [the Tribe] would not now be facing any time problem." *Ibid.* "Under long-established principles," the Tribe's failure to pursue its claim in any way during the six-year CDA timeframe reflects a "lack of diligence" that "precludes equity's operation." *Ibid.*; see *Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); *McQuiddy* v. *Ware*, 87 U.S. (20 Wall.) 14, 19 (1874) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights.").

IV. NO OTHER "EQUITABLE" FACTORS WARRANT TOLLING

The Tribe also points to what it asserts are other "equitable factors" to support its tolling argument, including the "absence of prejudice to the [g]overnment" and the "special relationship" between the United States and Indian tribes. Pet. Br. 49-52. As the Tribe concedes, these factors are not independent bases for equitable tolling.

A. Absence Of Prejudice Is Not An Independent Basis For Equitable Tolling

The Tribe contends (Br. 49) that its delayed filing had "no prejudicial impact on the [g]overnment," which, it argues, "weighs strongly in favor of" tolling. This Court has held, however, that absence of prejudice to the opposing party "is not an independent basis for invoking the doctrine [of equitable tolling] and sanctioning deviations from established procedures." *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 152 (1984) (per curiam). Rather, the absence of prejudice is "a factor to be considered in determining whether the doctrine of equitable tolling should apply *once a factor that might justify such tolling is identified.*" *Ibid.* (emphasis added). Because the Tribe has failed to identify any "extraordinary circumstance" that could trigger the possibility of tolling, an asserted absence of prejudice to the government is irrelevant.

The Tribe, moreover, is incorrect in asserting (Br. 50) that no prejudice resulted from its delayed filing because the *Cherokee Nation* putative class action put the government "on notice of the Tribe's claims." First, the government could hardly have been "on notice" of the Tribe's claims when it had executed a

release for its 1996-1998 ISDA contracts without reservation of any claims. J.A. 240-241.

Second, contrary to the Tribe's contention (Br. 50) and the opinion of the Federal Circuit in *ASNA II*, see Pet. App. 90a, neither the *Cherokee Nation* suit nor other tribal contract-support-costs litigation put the government "on notice" of the Tribe's particular claims. The purpose of the presentment requirement is to furnish such claim-specific notice. While suits by other tribes outlined several theories of government liability for additional contract-support-costs payments, the relevant notice for limitations purposes is not of legal theories in the abstract, but of concrete particular claims, including the underlying facts, legal assertions, and damages claimed. See *M. Maropakis Carpentry, Inc.* v. *United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (CDA requires "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim.") (citation omitted); see also Lodged Materials 2, 5, 8-9 (claims); Lodged Materials 15-16-20-23, 29-33 (contracting officer decisions explaining the various theories underlying each of the Tribe's claims).

The ultimate outcomes of other pending cases likewise depends on a review of the individual contract terms, the individual calculation and negotiation of contract-support-costs amounts for each year, and the actual payments made. It was precisely this individual nature of the tribes' claims that led the district court to deny class certification in *Cherokee Nation*. See 199 F.R.D. at 360. For this reason, particularly in the absence of the requisite claim presentment, the *Cherokee Nation* putative class action was insufficient to put the government on notice of the evidence that

might be required to answer the Tribe's claims or of the government's potential liability—information that would be critical to possible resolution of the dispute, allocation of funding, and litigation management. See, *e.g.*, Lodged Materials 15, 21, 29 (contracting officer decisions) (finding the Tribe provided insufficient information to evaluate its allegations that its indirect cost rate was miscalculated).

Finally, the Tribe's submission entirely ignores the central purpose of a statute of limitations—repose. See *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014) (noting the "considerable common ground in the policies underlying" statutes of limitations and statutes of repose). Bringing closure to contracts that ended six years earlier, for which no claims were filed, aids the administration of programs like IHS's which are constrained by budget cycles and the termination of annual contract terms at the conclusion of each year.

B. The Relationship Between Tribes And The United States Does Not Excuse Failure To Adhere To The CDA's Statutory Deadline

The Tribe lastly invokes (Br. 51-52) the "special government-to-government relationship between tribes and the United States" as a basis for equitable tolling. To be sure, ISDA's declaration of commitment recognizes Congress's intent to maintain the government's "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people." 25 U.S.C. 450a(b). But that statutory purpose does not negate the clear and mandatory rules established by ISDA, which expressly made the CDA applicable to disputes arising out of self-determination contracts. 25 U.S.C. 450m-1(d).

In support of its contention that the Tribe's special relationship with the United States supports equitable tolling, the Tribe quotes a Senate Report on the 1988 amendments to ISDA as stating that the "federal government's trust responsibility [to Indians] tempers all of the ordinary contract rules as applied to self-determination contracts." Pet. Br. 52 (brackets in original) (quoting Senate Report 36). That Senate Report in no way suggests, however, that the "special relationship" between Tribes and the government creates a broad exemption to the CDA's unambiguous presentment requirement and filing deadline. Indeed, the statement quoted by the Tribe does not refer to the CDA's application at all, but rather to a previous subsection, which amended ISDA to allow tribes to treat certain legal expenses as contract administration costs. See Senate Report 35.[22]

Moreover, any such interpretation of ISDA would be contrary to the courts of appeals' long-held view that the CDA's statutory limitations periods should "be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians* v. *United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). Similarly, in *United States* v. *Mottaz*, 476 U.S. 834, 848 n.10 (1986), this Court declined to exempt an Indian tribe from the applicable statutory deadline where its claim was

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[22] The Senate Report emphasized that this revised treatment of legal costs stands in contrast to the "more stringent rules applicable to standard procurement contracts," which typically prohibit the use of contract funds to pay legal fees and expect that such costs are built into the contract price. See Senate Report 35-36.

"based on a particular federal statute * * * that contains its own limitations period."

As this Court observed in *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), while there is a "general trust relationship between the United States and the Indian tribes," any specific obligations by the government are "governed by statute rather than the common law." *Id.* at 2318. ISDA and the CDA establish a clear procedure for the resolution of disputes over ISDA contracts, and an unambiguous six-year deadline for presentment of claims. The "general trust relationship" between the government and tribes does not override these unequivocal statutory requirements.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 25 U.S.C. 450b provides in pertinent part:

Definitions

For purposes of this subchapter, the term—

* * * * *

(e) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. § 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(f) "indirect costs" means costs incurred for a common or joint purpose benefiting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefited without effort disproportionate to the results achieved;

(g) "indirect cost rate" means the rate arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency;

* * * * *

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this sub-

chapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided[1] the last proviso in section 450j(a)[2] of this title, no contract (or grant or cooperative agreement utilized under section 450c-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

(*l*) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided*, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

* * * * *

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[1] So in original. Probably should be "provided in"

[2] See References in Text note below.

2. 25 U.S.C. 450j provides in pertinent part:

Contract or grant provisions and administration

* * * * *

(c) Term of self-determination contracts; annual renegotiation

(1) A self-determination contract shall be—

(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

(B) for a definite or an indefinite term, as requested by the tribe (or, to the extent not limited by tribal resolution, by the tribal organization), in the case of a mature contract.

The amounts of such contracts shall be subject to the availability of appropriations.

(2) The amounts of such contracts may be renegotiated annually to reflect changed circumstances and factors, including, but not limited to, cost increases beyond the control of the tribal organization.

(d) Calendar year basis for contracts

(1) Beginning in fiscal year 1990, upon the election of a tribal organization, the Secretary shall use the calendar year as the basis for any contracts or agreements under this subchapter, unless the Secretary and the Indian tribe or tribal organization agree on a different period.

(2) The Secretary shall, on or before April 1 of each year beginning in 1992, submit a report to the Congress

on the amounts of any additional obligation authority needed to implement this subsection in the next following fiscal year.

* * * * *

3. 25 U.S.C. 450j-1 provides in pertinent part:

Contract funding and indirect costs

(a) Amount of funds provided

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractable, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this subchapter, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a

tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 13a of this title.

* * * * *

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

(c) Annual reports

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

(d) Treatment of shortfalls in indirect cost recoveries

(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full

amount of need for indirect costs associated with a self-determination contract.

* * * * *

(g) Addition to contract of full amount contractor entitled; adjustment

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

* * * * *

4. 25 U.S.C. 450*l*, provides in pertinent part:

Contract or grant specifications

(a) Terms

Each self-determination contract entered into under this subchapter shall—

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) of this section (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

(b) Payments; Federal records

Notwithstanding any other provision of law, the Secretary may make payments pursuant to section 1(b)(6) of

such model agreement. As provided in section 1(b)(7) of the model agreement, the records of the tribal government or tribal organization specified in such section shall not be considered Federal records for purposes of chapter 5 of Title 5.

(c) Model agreement

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.

"(a) AUTHORITY AND PURPOSE.—

"(1) Authority.—This agreement, denoted a Self-Determination Contract (referred to in this agreement as the 'Contract'), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the 'Secretary'), for and on behalf of the United States pursuant to title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and by the authority of the _____ tribal government or tribal organization (referred to in this agreement as the 'Contractor'). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) PURPOSE.—Each provision of the Indian Self- Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following re-

lated functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

"(b) TERMS, PROVISIONS, AND CONDITIONS.—

"(1) TERM.—Pursuant to section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j(c)(1)), the term of this contract shall be _____ years. Pursuant to section 105(d)(1) of such Act (25 U.S.C. 450j(d)), upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (f)(2).

"(2) EFFECTIVE DATE.—This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

"(3) PROGRAM STANDARD.—The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (a)(2) of the Contract in conformity with the following standards: (list standards).

"(4) FUNDING AMOUNT.—Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified

in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j-1).

"(5) LIMITATION OF COSTS.—The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the Contract until such time as additional funds are awarded.

* * * * *

"(f) ATTACHMENTS.—

"(1) APPROVAL OF CONTRACT.—Unless previously furnished to the Secretary, the resolution of the _____ Indian tribe(s) authorizing the contracting of the programs, services, functions, and activities identified in this Contract is attached to this Contract as attachment 1.

"(2) ANNUAL FUNDING AGREEMENT.—

"(A) IN GENERAL.—The annual funding agreement under this Contract shall only contain—

"(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

"(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

"(B) INCORPORATION BY REFERENCE.—The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2."

5. 25 U.S.C. 450m-1 provides in pertinent part:

Contract disputes and claims

(a) Civil actions; concurrent jurisdiction; relief

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by

this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

* * * * *

(c) Application of laws to administrative appeals

The Equal Access to Justice Act (Public[1] Law 96-481, Act of October 1,[1] 1980; 92[1] Stat. 2325, as amended), section 504 of Title 5, and section 2412 of Title 28, shall apply to administrative appeals pending on or filed after October 5, 1988, by tribal organizations regarding self-determination contracts.

(d) Application of chapter 71 of Title 41

Chapter 71 of Title 41 shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

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[1] So in original. Probably should be "Public", "21,", and "94", respectively.

(e) Application of subsection (d)

Subsection (d) of this section shall apply to any case pending or commenced on or after March 17, 1986, before the Boards of Contract Appeals of the Department of the Interior or the Department of Health and Human Services[2] except that in any such cases finally disposed of before October 5, 1988, the thirty-day period referred to in section 504(a)(2) of title 5 shall be deemed to commence on October 5, 1988.

6. 28 U.S.C. 2412 provides in pertinent part:

Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

* * * * *

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in

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[2] See References in Text note below.

addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

* * * * *

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * * * *

7. 41 U.S.C. 7102 provides in pertinent part:

Applicability of chapter

(a) EXECUTIVE AGENCY CONTRACTS.—Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in

sections 1346 and 1491 of title 28) made by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair, or maintenance of real property; or

(4) the disposal of personal property.

* * * * *

8. 41 U.S.C. 7103 provides in pertinent part:

Decision by contracting officer

(a) CLAIMS GENERALLY.—

(1) SUBMISSION OF CONTRACTOR'S CLAIMS TO CONTRACTING OFFICER.—Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.

(2) CONTRACTOR'S CLAIMS IN WRITING.—Each claim by a contractor against the Federal Government relating to a contract shall be in writing.

(3) CONTRACTING OFFICER TO DECIDE FEDERAL GOVERNMENT'S CLAIMS.—Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.

(4) TIME FOR SUBMITTING CLAIMS.—

(A) IN GENERAL.—Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

(B) EXCEPTION.—Subparagraph (A) of this paragraph does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

(5) APPLICABILITY.—The authority of this subsection and subsections (c)(1), (d), and (e) does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.

(b) CERTIFICATION OF CLAIMS.—

(1) REQUIREMENT GENERALLY.—For claims of more than $100,000 made by a contractor, the contractor shall certify that—

(A) the claim is made in good faith;

(B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;

(C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and

(D) the certifier is authorized to certify the claim on behalf of the contractor.

* * * * *

(d) ISSUANCE OF DECISION.—The contracting officer shall issue a decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor.

(e) CONTENTS OF DECISION.—The contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.

* * * * *

(g) FINALITY OF DECISION UNLESS APPEALED.—The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter. This chapter does not prohibit an executive agency from including a clause in a Federal Government contract requiring that, pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * * * *

9. 41 U.S.C. 7104 provides in pertinent part:

Contractor's right of appeal from decision by contracting officer

(a) APPEAL TO AGENCY BOARD.—A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.

(b) BRINGING AN ACTION DE NOVO IN FEDERAL COURT.—

(1) IN GENERAL.—Except as provided in paragraph (2), and in lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

* * * * *

(3) TIME FOR FILING.—A contractor shall file any action under paragraph (1) * * * within 12 months from the date of receipt of a contracting officer's decision under section 7103 of this title.

(4) DE NOVO.—An action under paragraph (1) * * * shall proceed de novo in accordance with the rules of the appropriate court.

10. 41 U.S.C. 7105 provides in pertinent part:

Agency boards

* * * * *

(b) CIVILIAN BOARD.—

(1) ESTABLISHMENT.—There is established in the General Services Administration the Civilian Board of Contract Appeals.

* * * * *

(4) FUNCTIONS.—

(A) IN GENERAL.—The Civilian Board has jurisdiction as provided by subsection (e)(1)(B).

(B) ADDITIONAL JURISDICTION.—With the concurrence of the Federal agencies affected, the Civilian Board may assume—

(i) jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act exercised jurisdiction before January 6, 2007; and

(ii) any other function the agency board performed before January 6, 2007, on behalf of those agencies.

* * * * *

(e) JURISDICTION.—

(1) IN GENERAL.—

* * * * *

(B) CIVILIAN BOARD.—The Civilian Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency.

* * * * *

(D) OTHER AGENCY BOARDS.—Each other agency board has jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency.

* * * * *

(g) DECISIONS.—An agency board shall—

(1) to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes;

(2) issue a decision in writing or take other appropriate action on each appeal submitted; and

(3) mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

10. 41 U.S.C. 7107 provides in pertinent part:

Judicial review of agency board decisions

(a) REVIEW.—

(1) IN GENERAL.—The decision of an agency board is final, except that—

(A) a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit within 120 days from the date the contractor receives a copy of the decision; or

* * * * *

(b) FINALITY OF AGENCY BOARD DECISIONS ON QUESTIONS OF LAW AND FACT.—Notwithstanding any contract provision, regulation, or rule of law to the contrary, in an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a)—

(1) the decision of the agency board on a question of law is not final or conclusive; but

(2) the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is—

(A) fraudulent, arbitrary, or capricious;

(B) so grossly erroneous as to necessarily imply bad faith; or

(C) not supported by substantial evidence.

(c) REMAND.—In an appeal by a contractor or the Federal Government from the decision of an agency

board pursuant to subsection (a), the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with direction the court considers just and proper.

* * * * *

No. 14-510

In the Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a government contractor's erroneous predictions about pending litigation and its expectation that the government would deny its administrative claims constitute "extraordinary circumstances" that might warrant equitable tolling of the six-year limitations period in 41 U.S.C. 7103(a)(4) for presenting a contract claim to the government.

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In the Supreme Court of the United States

No. 14-510

MENOMINEE INDIAN TRIBE OF WISCONSIN,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 764 F.3d 51. The opinion of the district court (Pet. App. 20a-43a) is reported at 841 F. Supp. 2d 99.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. The petition for a writ of certiorari was filed on November 3, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, directs the Secretary of the Interior or the Secretary of Health and Human Services, upon a formal request by

an Indian tribe, to enter into a "self-determination contract" with a tribal organization to permit that organization to administer certain federal programs, services, functions, and activities for Indians that would have otherwise been administered by the relevant Secretary. 25 U.S.C. 450f(a). The amount of funds paid by the government under such a contract must be no less than the amount of funding that the "Secretary would have otherwise provided for the operation of the programs" during the fiscal year in question. 25 U.S.C. 450j-1(a)(1). ISDA further requires the government to pay an additional amount under the contract for reasonable "contract support costs" incurred for contract compliance and management. 25 U.S.C. 450j-1(a)(2). Because contract support costs may vary from year to year, the sums to be provided are negotiated on an annual basis and memorialized in an "annual funding agreement." See 25 U.S.C. 450j(c)(2); see also 25 U.S.C. 450*l*(c) (model agreement § 1(b)(4) and (f)(2)).

ISDA specifies that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.*, "shall apply to self-determination contracts." 25 U.S.C. 450m-1(d).[1] The CDA requires that "[e]ach claim" by a contractor against the government relating to a contract "shall be submitted to the contracting officer [at the relevant agency] for a decision." 41 U.S.C. 7103(a)(1) and (2); see 41 U.S.C. 605(a) (2006) ("[a]ll claims"). The CDA claim "need not be detailed, and may consist of a short written statement outlining the basis of the claim, estimating damages, and requesting a final decision."

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[1] This brief, like the court of appeals' opinion (see Pet. App. 3a n.1), primarily cites the current codification of the CDA rather than its prior codification at 41 U.S.C. 601 *et seq.* (2006).

Pet. App. 4a. In 1994, Congress amended the CDA to require that any such claim by a contractor "shall be submitted within 6 years after the accrual of the claim." Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2531(a)(1), 108 Stat. 3322 (41 U.S.C. 7103(a)(4)). That six-year limitations period applies to claims arising under contracts awarded on or after October 1, 1995. *Id.* § 10001(b), 108 Stat. 3404; 48 C.F.R. 33.206(a).

"The contracting officer's decision on a claim is final and conclusive and is not subject to review * * * , unless an appeal or action is timely commenced as authorized by [the CDA]." 41 U.S.C. 7103(g). With an exception not relevant here, the CDA provides a contractor aggrieved by a contracting officer's decision with two paths to review, both of which lead to the Federal Circuit. The contractor may bring an administrative appeal, or a contract action before the Court of Federal Claims (CFC) "in lieu" of an administrative appeal, 41 U.S.C. 7104(a) and (b); see 25 U.S.C. 450m-1(d), with further review of the resulting decision in the Federal Circuit, 28 U.S.C. 1295(a)(3); 41 U.S.C. 7107(a)(1). ISDA provides tribal contractors with a third path to review the contracting officer's decision. ISDA vests federal district courts with jurisdiction (concurrent with the CFC) over civil actions arising under ISDA contracts, 25 U.S.C. 450m-1(a), with review of the resulting decision in the appropriate regional court of appeals, 28 U.S.C. 1291.

2. Petitioner (the Tribe) is a federally recognized Indian tribe. Pet. App. 21a. As relevant here, the Tribe contends that it should have been paid a greater amount for contract support costs in three years: 1996, 1997, and 1998. *Id.* at 8a. The Tribe, however,

did not submit its claims to a contracting officer until September 2005, after the six-year limitations period for each claim had elapsed. *Ibid.* This case turns on whether the Tribe has established that its six-year period for filing its contract claims with a contracting officer under the CDA should be equitably tolled.

The underlying dispute about the proper amount of contract support costs owed under ISDA self-determination contracts arose from a disagreement that was based in significant part on an ISDA provision specifying that "the provision of funds under [ISDA] is subject to the availability of appropriations," 25 U.S.C. 450j-1(b). See Pet. App. 5a; see also *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 640-647 (2005). Because Congress's appropriations for contract support costs were insufficient to pay for all such costs incurred under ISDA contracts, see *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181, 2187 (2012), the government read that provision to require only partial payment of such costs. See Pet. App. 5a. Many tribes, including for example the Cherokee Nation, pursued timely contract claims against the government for unpaid contract support costs. See *id.* at 5a-6a. The Tribe was not one of them.

In *Cherokee Nation* v. *United States*, No. 99-cv-92 (E.D. Okla.), the Cherokee Nation and another tribe filed suit in 1999 and moved to certify a class of "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs under [ISDA] contracts * * * that were not fully paid their contract support costs needs" from 1988 to 2000. *Cherokee Nation* v. *United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001). The district court denied class certification in February 2001, *id.* at 366, and the case proceeded only on

the claims of the named plaintiffs. In March 2005, this Court held in *Cherokee Nation* that the government was liable to pay the amount of contract support costs specified in its ISDA contracts with the plaintiff tribes for fiscal years 1994 through 1997. 543 U.S. at 634, 636.

In September 2005, six months after this Court's *Cherokee Nation* decision, the Tribe submitted its own CDA claim to a contracting officer seeking unpaid contract support costs from 1995 through 2004. Pet. App. 8a. The contracting officer, as relevant here, denied the claims from 1996 to 1998 as untimely. *Ibid.*

3. a. The Tribe sought judicial review of the contracting officer's decision in the District Court for the District of Columbia, arguing that the CDA's limitations period should have been tolled. The district court initially dismissed on the ground that the limitations period was jurisdictional and did not permit tolling. Pet. App. 70a-71a & n.2.

The D.C. Circuit reversed in part and remanded. Pet. App. 44a-68a. The court of appeals concluded that the CDA's six-year period for filing a claim with a contracting officer is not jurisdictional, *id.* at 49a-55a, and did not completely preclude either class-action tolling under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), or equitable tolling, see Pet. App. 55a-65a. The D.C. Circuit, however, rejected the Tribe's contention that it was entitled to class-action tolling during the period in which the class-certification motion in *Cherokee Nation* was pending. *Id.* at 55a-62a. The court held that class-action tolling is not available to "asserted class members" who, like the Tribe, are "ineligible to participate in the class action at the time class certification is denied" due to

their failure to file an administrative CDA claim satisfying the CDA's "exhaustion requirement." *Id.* at 57a-58a. The Tribe does not challenge that holding here. The court of appeals remanded the case to the district court to resolve the Tribe's contention that the six-year period for filing a claim should be equitably tolled. *Id.* at 65a.

b. The district court entered summary judgment for the government on the Tribe's 1996-1998 contract-support-cost claims based on its holding that equitable tolling was unwarranted. Pet. App. 28a-37a. The court explained that "a litigant must establish two things for equitable tolling to apply: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" *Id.* at 28a (quoting *Holland* v. *Florida*, 560 U.S. 631, 649 (2010)). The Tribe, the court observed, admitted that it was "aware that it only had six years to file a claim, but assumed that the deadline would be tolled based upon *Cherokee Nation*." *Id.* at 33a (citing the declaration of the Tribe's Health Department Administrator, *id.* at 100a ¶ 8). The court determined that the factors that the Tribe identified to justify its failure to file a timely claim "do not, individually or collectively, amount to 'an extraordinary circumstance'" that could warrant tolling. *Id.* at 34a. Although "filing an administrative claim is a relatively simple process," the court explained, the Tribe "cannot point to any affirmative act it took in over six years to pursue its claim diligently"; the government engaged in "no affirmative misconduct" that could warrant tolling; and the Tribe proffered no facts to support its tolling request beyond those already found "insufficient to support class action tolling." *Id.* at 37a.

After the district court dismissed an outstanding claim on which the parties were nearing settlement,[2] the Tribe appealed the district court's final judgment. At the Tribe's request, the D.C. Circuit held the appeal in abeyance pending the Federal Circuit's resolution of a similar equitable-tolling contention by another tribal entity in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012) (*ASNA*). 9/28/2012 Order.

c. In *ASNA*, a tribal organization (ASNA) that had entered into an ISDA self-determination contract to operate a hospital in Alaska waited (like the Tribe here) until September 2005 to file its claims for unpaid contract support costs for 1996, 1997, and 1998. See 699 F.3d at 1290, 1293. The Federal Circuit had earlier held, like the D.C. Circuit here, that class-action tolling was unavailable in *ASNA*. See *ASNA* v. *Sebelius*, 583 F.3d 785, 791-797 (2009), cert. denied, 561 U.S. 1026, and 562 U.S. 835 (2010). In the subsequent *ASNA* appeal for which the appeal in this case was held in abeyance, however, a divided panel of the Federal Circuit concluded that equitable tolling of the six-year CDA limitations period was warranted based on facts materially similar to those here. 699 F.3d at 1295-1298.

The *ASNA* majority reasoned that its equitable tolling decision turned on two "critical questions":

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[2] The district court dismissed petitioner's remaining claim without prejudice and ordered that the dismissal would become a dismissal with prejudice 45 days later unless the parties moved to reopen the case with the Court's approval in that period. 5/1/2012 Order (Doc. 55). After 45 days elapsed and the remaining claim was dismissed with prejudice, however, the district court did not enter its judgment as a separate document. See Fed. R. Civ. P. 58(a). Petitioner's appeal was filed less than 60 days after the dismissal with prejudice of its last remaining claim in this action.

(1) "whether ASNA pursued its rights diligently even though it did not present" its contract claims for unpaid contract support costs within the six-year limitations period, and (2) "whether [ASNA's] reliance on the then-existing legal landscape in deciding not to present [its claims] constituted an 'extraordinary circumstance' sufficient to warrant equitable tolling." 699 F.3d at 1296. The court concluded that "ASNA pursued its rights by monitoring the legal landscape and taking action as appropriate," *id.* at 1298, because (1) ASNA (like the Tribe here) had been a member of a class action certified in 1993 in *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999), that sought reimbursement for certain unpaid "indirect costs" under ISDA contracts with the Department of the Interior, *id.* at 1094; (2) the district court in *Ramah Navajo* had rejected the government's contention that class membership must be limited to tribes that had presented their CDA claims to a contracting officer; (3) ASNA (like the Tribe here) obtained funds from the government's partial settlement of the *Ramah Navajo* class claims. *ASNA*, 699 F.3d at 1291, 1296-1297. The Federal Circuit determined on that basis that ASNA "took reasonable, diligent, and appropriate action" when it later concluded that, rather than file its own CDA claim with a contracting officer, it would remain as a potential class member of a different putative class action filed by the Pueblo of Zuni seeking to recover contract support costs under contracts with the Department of Health and Human Services from 1993 onward. *Ibid.* (citation omitted).

The *ASNA* majority characterized those events as "unique facts and extraordinary circumstances" and held that they warranted equitable tolling. Pet. App.

1298.[3] In so holding, the majority expressly "decline[d] to follow the reasoning recently employed by [the] district court" in this case. *Id.* at 1296 n.4.

Judge Bryson dissented. *ASNA*, 699 F.3d at 1298-1301. He concluded that ASNA had not exercised reasonable diligence in pursuing its rights. *Id.* at 1298-1299. Judge Bryson further concluded that "the majority [failed to] point[] to any facts that would suffice to meet th[e] exacting standard" in *Holland*'s "second prong," which requires that the party seeking equitable tolling show that "'some extraordinary circumstance stood in his way and prevented timely filing.'" *Id.* at 1300 (quoting *Holland*, 560 U.S. at 649).

d. After the Federal Circuit issued its decision in *ASNA*, the D.C. Circuit in this case affirmed the district court's denial of equitable tolling. Pet. App. 1a-19a. The court of appeals explained that "[e]quitable tolling is available to a party 'only if he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way" and prevented timely filing.'" *Id.* at 10a (quoting *Holland*, 560 U.S. at 649). The court held that the Tribe failed to establish any such "extraordinary circumstance" warranting tolling. *Id.* at 2a.

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[3] The majority acknowledged, however, that in 2002, the district court in *Ramah Navajo* had entered an order noting that the government would resist class certification on at least one of the new claims filed in that case, that "decertification of both claims is a possibility," and that "a number of decisions have been announced . . . which are harmful to the Class's claims." 699 F.3d at 1291 n.2 (brackets omitted) (quoting *Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303, 1308 (D.N.M. 2002).

The court of appeals explained that, "[t]o count as sufficiently 'extraordinary' to support equitable tolling, the circumstances that caused a litigant's delay must have been beyond its control," Pet. App. 10a, and "cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation," *id.* at 11a. Here, the "Tribe faced no extraordinary circumstances," the court reasoned, "because the obstacles the Tribe confronted were ultimately of its own making." *Id.* at 12a. The Tribe was not "prevented by external obstacles from timely filing" and, instead, it "delay[ed] pursuing its claims" because of its own "inadequate responses to relatively routine legal events." *Ibid.*

The court of appeals addressed and rejected the Tribe's three arguments for equitable tolling. Pet. App. 2a, 12a-19a. "[T]he legal misunderstandings and tactical mistakes the Tribe has identified," the court concluded, "do not amount to 'extraordinary circumstance[s]' justifying equitable tolling." *Id.* at 2a (brackets in original).

First, the court of appeals rejected the Tribe's reliance on its (mistaken) expectation that it would "be a member of the *Cherokee Nation* class" because it was previously a member of the earlier certified class action in *Ramah Navajo* that the government had partially settled. Pet. App. 13a; see *id.* at 6a. "The flaw in the Tribe's calculations was that it was not eligible to participate in the *Cherokee Nation* class," and its apparent "belief that it could participate in the *Cherokee Nation* class without exhausting its administrative remedies was unjustified." *Id.* at 13a-14a. That "miscalculation," the court explained, was not an

extraordinary circumstance beyond the Tribe's control. *Id.* at 14a.

Second, the court of appeals rejected the Tribe's contention that its failure to file a timely CDA claim for unpaid contract support costs should be excused because the government had taken the position that such costs were not properly payable such that "the certainty of failure * * * stood in [the Tribe's] way." Pet. App. 15a. The court reasoned that "[a] party is not excused from timely filing its claim because the agency's view of the law might be inhospitable." *Ibid.* "The federal courts, not contracting officers, are the final word on federal law," and it was therefore "incumbent upon [the Tribe] to test [its] right and remedy in the available forums." *Id.* at 15a-16a (citation omitted). Moreover, given that the "procedure for exhausting administrative remedies is simple," the court added, "[w]hat stood between the Tribe and class-action tolling [as a putative class member in *Cherokee Nation*] was little more than an envelope and a stamp." *Id.* at 17a.

Finally, the court of appeals rejected the Tribe's contention that the combination of factors that it faced was an "extraordinary circumstance" warranting tolling, explaining that "none of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims." Pet. App. 18a.

The court of appeals thus stated that it "agreed with the dissent in [*ASNA*] that equitable tolling was unwarranted there, as it is here, for want of an 'extraordinary circumstance' under *Holland*," and that, as Judge Bryson explained in his *ASNA* dissent, "the [*ASNA*] majority failed to identify any obstacle that stood in the Tribe's way to prevent timely filing of its

claims." Pet. App. 15a n.5. Because the court held that the Tribe failed to identify any "extraordinary circumstance[]" that prevented it from timely filing a claim, and therefore had not satisfied the second prong of the two-part test for equitable tolling, the court did not pass upon whether the Tribe had satisfied the first prong by diligently pursuing its rights. *Id.* at 12a n.4.

DISCUSSION

The court of appeals correctly held that neither the Tribe's erroneous prediction of the outcome of litigation, nor its expectation that the government would deny its administrative claims, warrants equitable tolling of the CDA's six-year limitations period. That decision, however, squarely conflicts with the Federal Circuit's decision in *Arctic Slope Native Ass'n* v. *Sebelius*, 699 F.3d 1289 (2012), which found tolling appropriate on materially similar facts. In the government's view, certiorari is warranted.

The Federal Circuit's decision effectively sets the nationwide rule for equitable tolling under the CDA because the normal routes to review of a contracting officer's decision under the CDA end in the Federal Circuit. See p. 3 *supra*. Although ISDA permits tribal contractors to appeal the denial of their CDA claims under ISDA contracts to district courts outside the Federal Circuit's supervision (*ibid.*), tribes retain the option to follow the normal CDA routes to the Federal Circuit. In addition, the Federal Circuit's willingness to apply equitable tolling in this context in the absence of any showing that extraordinary circumstances prevented a tribal contractor from timely filing its CDA claim has confounded the government's efforts to achieve an orderly resolution of outstanding

claims for unpaid ISDA contract support costs in the wake of this Court's decisions in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), and *Salazar* v. *Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012). This Court's review is therefore warranted.

1. The court of appeals correctly held that the Tribe is not entitled to equitable tolling of its six-year period for submitting a contract claim to a contracting officer. Such tolling is appropriate "only if" the litigant seeking tolling shows that it had been pursuing its rights diligently but that "'some extraordinary circumstance stood in [its] way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). As the court of appeals held, no such "extraordinary circumstance" stood in the Tribe's way and "prevented [its] timely filing." The Tribe appears to have simply miscalculated its deadline because it mistakenly believed that it could obtain class-action tolling during the pendency of the class-certification motion in *Cherokee Nation*. See Pet. App. 100a ¶ 8.

a. This Court has made clear that "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418. A litigant seeking such equitable relief must therefore establish its own diligence, because "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 151 (1984) (per curiam); see *Pace*, 544 U.S. at 419 ("Under long-established principles, petitioner's lack of diligence precludes equity's operation."). But diligence alone is

insufficient. Courts properly exercise their authority to extend equitable relief quite "sparingly," *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), and, for that reason, "the circumstances of a case must be 'extraordinary' before equitable tolling can be applied." *Holland*, 560 U.S. at 652. A litigant must accordingly show, in addition to its own diligence, that "'some extraordinary circumstance stood in [its] way' and prevented timely filing'" before it can secure tolling. *Id.* at 649 (quoting *Pace*, 544 U.S. at 418).

Equitable tolling can be appropriate where a party's efforts to obtain relief have been "thwarted by forces wholly beyond [its] control." *Holland*, 560 U.S. at 660 (Alito, J., concurring in part and concurring in the judgment); see *Wallace* v. *Kato*, 549 U.S. 384, 400-401 (2007) (Breyer, J., dissenting) (explaining that courts have applied equitable tolling where "a 'plaintiff because of disability, irremediable lack of information, or other *circumstances beyond his control* just cannot reasonably be expected to sue in time'") (emphasis added; citation omitted). "[A] party's infancy or mental disability, absence of the defendant from the jurisdiction, [or] fraudulent concealment" may thus warrant tolling in certain cases. *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 n.17 (2014). By contrast, a "'garden variety claim of excusable neglect'" or a "miscalculation" in litigation has never been a basis for equitable tolling. *Holland*, 560 U.S. at 651 (quoting *Irwin*, 498 U.S. at 96); see *Lawrence* v. *Florida*, 549 U.S. 327, 336-337 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

The Tribe's claim falls squarely in the latter category. The Tribe does not contend that it made active efforts to preserve its rights during the statutory period but was somehow prevented from doing so by forces beyond its control. Rather, the Tribe explains that it "did not file individual claims" because it "assumed" that it could benefit from the *Cherokee Nation* litigation as it did from the earlier *Ramah Navajo* class action that the government had partially settled. Pet. App. 100a ¶ 7 (declaration of the Tribe's Health Department Administrator). When the district court in *Cherokee Nation* denied class certification in 2001, "the Tribe considered whether to file individual claims," but it still decided against doing so because it "ha[d] limited resources" to expend on litigation; "the case law was not clear on whether tribal contract support cost claims were valid"; the Tribe "assumed" that "the contracting officer would deny" their claims if the Tribe filed them; and the Tribe believed that it had "a little more time" because the *Cherokee Nation* class action would trigger class-action tolling. *Id.* ¶ 8. The Tribe therefore simply decided to do nothing and just "wait[] to see what the Supreme Court would do." *Ibid.* As the court of appeals concluded, such "[d]elays caused by a party's [own] inauspicious legal judgments are not 'extraordinary circumstances' sufficient to justify equitable tolling." *Id.* at 19a (brackets omitted).

b. Although the Tribe contends (Pet. 18-23) that the court of appeals erred in requiring that it identify some "external obstacle" that prevented its timely filing, that requirement is reflected in the canonical formulation of the "extraordinary circumstance" test, which requires that "'some extraordinary circum-

stance stood in [the litigant's] way' and prevented timely filing." *Holland*, 560 U.S. at 649 (quoting *Pace*, 544 U.S. at 418). That formulation would make little sense if equitable tolling were designed to apply to circumstances in which a competent litigant stands in its *own* way and prevents timely filing. Such self-inflicted wounds are not properly remedied at equity.

There is also no merit to the Tribe's argument (Pet. 15-17) that the D.C. Circuit erred because it declined to address "whether the Tribe exercised reasonable diligence," Pet. 15. Although the Tribe asserts that "[t]he two prongs of the *Holland* test" are not distinct factors "to be applied separately," *ibid.*, this Court has made clear that a litigant seeking equitable tolling must "establish[] [the] two elements" of that test, *Pace*, 544 U.S. at 418. This Court has thus rejected equitable-tolling claims—like the court of appeals did here—where the litigant failed to demonstrate one of the two components of the standard without addressing whether the litigant satisfied the other component. See, *e.g.*, *Lawrence*, 549 U.S. at 336-337 (rejecting equitable tolling without addressing diligence because the habeas petitioner fell "far short of showing 'extraordinary circumstances'"); *Pace*, 544 U.S. at 418 (noting without resolving the litigant's argument that he had "satisfied the extraordinary circumstance test," and holding that, "[e]ven if [the Court] were to accept [the argument], he would not be entitled to relief because he has not established the requisite diligence").

c. The Federal Circuit's equitable-tolling holding in *ASNA* based on facts materially similar to those here does not survive scrutiny. The Federal Circuit found "extraordinary circumstances" warranting

tolling (699 F.3d at 1298) where ASNA "[m]onitor[ed]" and (in the Federal Circuit's view) "reasonably interpret[ed] applicable legal proceedings" in the "class action context," *id.* at 1297. Like the Tribe here, ASNA argued that it could reasonably rely on the fact that it was a class member in the earlier *Ramah Navajo* case, in which the district court certified a nationwide class of all tribes having ISDA contracts with the Department of the Interior, including those that had failed to submit a CDA claim to a contracting officer. *Id.* at 1291. That district court ruling, the Federal Circuit concluded, was the only "on-point authority" at the time that "specifically addressed the exhaustion of remedies issue" and, in the Federal Circuit's view, the Tribe therefore acted reasonably by relying on *Ramah Navajo* and failing to submit its own claim to a contracting officer. *Id.* at 1297. But it is settled that a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or *even upon the same judge in a different case.*" *Camreta* v. *Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (emphasis added; citation omitted). A litigant that chooses to rely on such non-precedential district court rulings does so at its own hazard. Such reliance on a prior (incorrect) district court decision is simply a type of "miscalculation" that is "not sufficient to warrant equitable tolling." See *Lawrence*, 549 U.S. at 336-337. Thus, as the court of appeals held, the Tribe's own "legal misunderstandings and tactical mistakes" are not "extraordinary circumstances" that might support tolling because they are not obstacles beyond the Tribe's control that "prevented" a timely filing. Pet. App. 2a (brackets omitted).

2. Although the D.C. Circuit correctly held that the Tribe failed to identify any "extraordinary circumstance" that prevented a timely filing and that might support equitable tolling, the government agrees with the Tribe that certiorari is warranted to resolve the conflict of authority between the decision in this case and the Federal Circuit's decision in *ASNA*. Not only does the Federal Circuit's *ASNA* decision threaten to expand significantly the scope of equitable tolling in CDA actions against the government over which the Federal Circuit exercises appellate jurisdiction, the question presented has great practical importance for the government's efforts to achieve an orderly resolution of a significant number of outstanding tribal claims for contract support costs in the wake of this Court's decisions in *Cherokee Nation*, 543 U.S. 631, and, more recently, in *Ramah Navajo*, 132 S. Ct. 2181.

Cherokee Nation (2005) and *Ramah Navajo* (2012) together establish that the government must pay the full amount of contract support costs incurred by a tribal contractor under the ISDA, including for years in which Congress capped the appropriations available to pay those costs at a sum insufficient to pay all contractors. See *Ramah Navajo*, 132 S. Ct. at 2186 ("ISDA mandates that the Secretary shall pay the full amount of 'contract support costs' incurred by tribes in performing their contracts."). Because Congress's underfunding of ISDA contract support costs began in the early 1990s, see *id.* at 2186-2187, the Department of Health and Human Service's Indian Health Service (IHS) has informed this Office that thousands of historical claims from hundreds of tribal contractors must now be brought to an orderly resolution.

Many tribal contractors filed timely claims under the CDA for their unpaid contract support costs. The government has now either paid those claims or is working with the contractors to determine the proper amounts that may be owed. Many other tribal contractors, however, failed to file claims for payment under the CDA until after this Court in *Cherokee Nation* (and, for some, after *Ramah Navajo*) rejected the government's primary substantive defenses to tribal contract-support-cost claims. What is most immediately at stake in the division of authority between the D.C. and Federal Circuits is whether tribal contractors could then submit numerous older claims for otherwise time-barred contract payments.

Under the governing statutory scheme, it is the Federal Circuit's erroneous decision that will dictate the nationwide rule absent review by this Court. The CDA gives government contractors like the tribal contractors at issue here the option to obtain review of the denial of their contract claims in proceedings leading to the Federal Circuit. See p. 3, *supra*. Although ISDA also provides tribal contractors an alternative route of review that avoids the Federal Circuit's appellate jurisdiction (see *ibid.*), it is highly unlikely that contractors with untimely claims will choose to pursue that route in light of the Federal Circuit's broad understanding of equitable tolling in *ASNA* and the D.C. Circuit's contrary determination in this case. Indeed, the IHS has informed this Office that it has been unable to resolve some untimely claims with tribal contractors that have emphasized that the Federal Circuit's rationale for allowing equitable tolling in *ASNA* is not meaningfully case-specific.

The uncertainty created by the Federal Circuit's erroneous decision in *ASNA*—and the increasing volume of untimely claims inspired by it—have confounded the government's attempts to achieve orderly resolution of the ongoing litigation over tribal contract support costs. Although the D.C. Circuit correctly rejected the Tribe's arguments here, the resulting division of authority has exacerbated the uncertainty that the government and tribal contractors face. This Court's review is warranted to resolve that conflict, as well as to ensure that the proper equitable tolling framework is applied to CDA claims generally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

The Menominee Tribe seeks equitable tolling of the statute of limitations on its 1996 through 1998 contract support cost claims for the length of time that the *Cherokee Nation* class action was pending against the Indian Health Service ("IHS"). See *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). Though the facts are complex, the relatively straightforward question at the heart of this case is whether reasonable reliance on class action tolling can ever justify equitable tolling of a statute of limitations.

In *Irwin v. Department of Veterans Affairs*, this Court indicated that equitable tolling, though granted "only sparingly," is justified by "timely filing of a defective class action," suggesting that equitable tolling may be available where class action tolling fails. 498 U.S. 89, 96 & n.3 (1990) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974)). If such circumstances can ever give rise to an equitable claim for relief, they do in this case.

The facts here are indeed extraordinary:

(1) Menominee's reliance on class action tolling was particularly justified by the Tribe's membership in the *Ramah Navajo Chapter v. Babbitt* class action,[1] a nearly identical and pre-existing class action in which the Government's jurisdictional presentment argument (which would have excluded the Tribe because it had not presented separate administrative claims) was expressly rejected;

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[1] 50 F. Supp. 2d 1091 (D.N.M. 1999).

(2) Menominee was clearly a member of the *Cherokee Nation* putative class as described in the complaint and by the court itself, because the Tribe was listed on the IHS shortfall reports that formed the basis for the class; and

(3) the Tribe was denied the benefit of class action tolling only *after* filing, when the D.C. Circuit held that Menominee could not have been a member of the *Cherokee Nation* class, on the basis of the same presentment argument rejected in *Ramah*.

The Government argues, and the D.C. Circuit held below, that the same jurisdictional facts precluding class action tolling in this case must necessarily preclude equitable tolling as well. But if that were true, neither class action tolling nor equitable tolling could operate as intended. In *American Pipe*, "[this] Court reasoned that unless the filing of a class action tolled the statute of limitations, potential class members would be induced to file motions to intervene or to join in order to protect themselves against the possibility that certification would be denied." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). As a result, "[t]he principal purposes of the class-action procedure—promotion of efficiency and economy of litigation—" would be frustrated. *Id.*

Despite *American Pipe*, any putative class member relying on class action tolling could find itself in Menominee's position as a result of a later, unpredictable ruling on the proper bounds of the class. Without the protection of equitable tolling for later-excluded parties whose reliance on class action tolling was reasonable and justified, the policy underpinnings of *American Pipe* would be eroded. Reliance on class action tolling would be too risky, and the only prudent course of action for putative class members would be to file

the sort of "protective motions" and "multiplicity of filings" that *American Pipe* sought to avoid. See *American Pipe*, 414 U.S. at 553; *Crown, Cork & Seal Co.*, 462 U.S. at 351.

The standard for equitable tolling as articulated by this Court in *Holland* is satisfied in cases like this one, where the party seeking tolling can demonstrate actual and reasonable reliance on class membership (diligence), followed by a contrary ruling years later rendering class action tolling inapplicable (extraordinary circumstances). *Holland v. Florida*, 560 U.S. 631, 649 (2010). A party that reasonably relies on *American Pipe* tolling only to have the courts narrow its application after the fact is far different from a party that simply sleeps on its rights. Equitable tolling is intended to apply in such extraordinary circumstances in order to "relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules[.]" *Id.* at 650. Hence, equitable tolling is not precluded merely because class action tolling is held not to apply.

The application of equitable relief must always be determined on a "case-by-case" basis, *id.*, and the unique facts of this case more than justify it: adding to Menominee's reasonable reliance on its membership in the *Cherokee Nation* putative class (in light of the *Ramah* precedent), the Government's widespread and sustained breach of its statutory and fiduciary duties under the Indian Self-Determination Act ("ISDA") (25 U.S.C. § 450 *et seq.*); the Tribe's lack of resources, due in part to the Government's fiduciary breach; the complex and evolving legal landscape, including this Court's momentous decision on contract support cost liability in *Cherokee Nation*; and the lack of any prejudice to the Government all confirm that tolling of the

statute of limitations is the appropriate equitable result in this case.

ARGUMENT

I. Menominee reasonably believed that the limitations period had been tolled as a result of the *Cherokee Nation* putative class action.

a. Menominee's reliance on *Cherokee Nation* was reasonable in light of *Ramah* and the nature of the class claims.

An unusual and important factor in this case is the existence of a prior, nearly identical class action—*Ramah*—also stemming from the Government's policy decision to systematically underfund contract support costs under the ISDA. Menominee never had to present administrative claims to participate as a class member in *Ramah*, because the *Ramah* court held it was unnecessary. J.A. 37-39.

The Government argues that Menominee should not have relied on the *Ramah* precedent in determining that it was part of the *Cherokee Nation* putative class, because *Ramah* was both "contrary to precedent"—in essence, wrongly decided—and distinguishable. U.S. Br. 19, 35-38. The Government provides a long list of statutory provisions and case law that it claims establish, as a general matter, that presentment is a necessary prerequisite to class membership. U.S. Br. 28-34. But the Government's general statement of the law ignores the far more relevant fact that the *Ramah* court specifically rejected the Government's view.

The *Ramah* court recognized that presentment of administrative claims under the Contract Disputes Act is a jurisdictional prerequisite to filing a complaint in federal court. But since the named plaintiffs in *Ramah*

had filed administrative claims, the court held that it was not necessary for every other class member to do so. J.A. 37-39. The court specifically reached this holding because the action "challenge[d] the policies and practices adopted by the BIA as being contrary to the law and [sought] to make systemwide reforms[,]" and because it would be futile for every class member to submit individual claims. J.A. 38-39. The court thus did not ignore the Government's precedent, but found that it was neither applicable nor persuasive.

Having benefitted from that rule in *Ramah*, there was every reason for the Tribe to assume the same rule would apply in *Cherokee Nation*. The *Cherokee Nation* action also challenged a broad, systemic problem: the class-wide contract support cost underpayments at issue were not isolated incidents of breach of contract, as the Government suggests, but the result of the intentional application of broad agency policies to distribute less than 100% of contract support cost need. See J.A. 129-36. These policies resulted from and implemented the agency's misinterpretation of governing appropriations law, which was directly challenged in *Cherokee Nation* and ultimately rejected by this Court in that very case. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 647 (2005).[2]

As of 1999, moreover, the same shortfall claims alleged in *Cherokee Nation* were added to the *Ramah* class action, removing any meaningful distinction between the cases.[3] See Stipulated Order, *Ramah Navajo Chapter*

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[2] This Court rejected similar arguments by the Bureau of Indian Affairs ("BIA") again in *Ramah*, underscoring the similarity of the cases. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

[3] Notably, these claims were added *after* the Contract Disputes Act six-year statute of limitations was adopted in 1994. See

v. Babbitt, No. 90-0957 (D.N.M. Sept. 30, 1999), Docket entry No. 347. The Government could have moved to decertify the *Ramah* class upon introduction of the shortfall claims or opposed them on presentment grounds if it believed that such claims were not amenable to class action treatment.[4] In fact, the Government could move at any time to decertify the class on jurisdictional grounds. It has not.

Instead, the Government has relied on the initial *Ramah* class certification order to furnish the district court with jurisdiction to approve settlements extinguishing its liability for contract support cost underpayments, including the *same* shortfall claims at issue in this case. These include a 2002 settlement of shortfall and direct contract support cost claims against the BIA through 1993 and 1994, respectively, and a major proposed settlement now pending with the district court that would settle shortfall claims for 1994 through 2013 in the amount of $940,000,000. Judgment Approving Second Partial Settlement, *Ramah Navajo Chapter v. Jewell*, No. 90-0957 (D.N.M. Dec. 6, 2002), Docket entry No. 731; Order Granting Preliminary

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Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a)(1), 108 Stat. 3322 (codified as amended at 41 U.S.C. § 7103(a)(4)(A)). Accordingly, the *Ramah* shortfall claims were being litigated as a class action under the exact same statutory framework that faced the *Cherokee Nation* court when class certification was sought. See U.S. Br. 38 n.20.

[4] The Government initially objected to the new shortfall claims but then withdrew its objections and consented to their inclusion. The Government threatened to oppose certification of other direct contract support cost claims, but apparently never did so, instead seeking settlement. See *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1307 & 1314 (D.N.M. 2002).

Approval of Final Settlement Agreement, *id.*, Docket entry No. 1314.

Some courts have held that a district court has no authority to approve a class settlement when it lacks jurisdiction over the class. See, *e.g.*, *In re Deepwater Horizon*, 732 F.3d 326, 343 (5th Cir. 2013), cert. denied 135 S. Ct. 754 (2014) (a settlement including class members that lacked standing would be unlawful). The parties in *Ramah* have represented to the court in that case that certain claims forms, which must be submitted by class members in order to receive a share of the proposed settlement, will fulfill the presentment requirement. See Affidavit of Co-Class Counsel C. Bryant Rogers, *Ramah Navajo Chapter v. Jewell*, No. 90-0957 (Sept. 29, 2015), Docket entry No. 1313-11, ¶¶ 50 & 51. Those forms will be submitted in 2016 at the earliest (assuming the proposed settlement is quickly approved), but the settlement includes claim years dating back to 1994—meaning that presentment of the claims forms will be outside the six-year statute of limitations for many of those claims. In order for the court to properly exercise jurisdiction over the settlement under the Government's own theory, then, the statute of limitations on those claims must be deemed to have been tolled. Thus, even as the Government claims that Menominee cannot reasonably rely on *Ramah* in seeking equitable tolling of its claims, the Government *itself* has agreed that tolling should apply to many of the claims in that case.[5]

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[5] The Government's presentment theory in *Ramah* also undermines its assertion in this case that presentment, which the Government maintains is a necessary prerequisite for class membership, must be accomplished *prior* to class certification. See U.S. Br. 28-35. That is, if presentment can be satisfied

Having made the decision not to challenge the *Ramah* class with respect to the shortfall claims, it is unreasonable for the Government to now argue that Menominee cannot rely on that case because the grounds for jurisdiction are flawed. Moreover, prior to the *Zuni* ruling in 2007,[6] there was no reason to believe that the *Cherokee Nation* court would not have made the same jurisdictional determination had the court addressed the issue.

b. Menominee's reliance on class action tolling was reasonable in light of the *Cherokee Nation* certification order.

Menominee's reliance on class action tolling was justified by the *Cherokee Nation* court's decision on class certification, because Menominee was plainly a member of the putative class as described by that court. Nothing in the *Cherokee Nation* decision indicated that non-presenters were excluded from the putative class; to the contrary, the court indicated that any tribe listed on the IHS shortfall reports as having experienced a shortfall would have been included in the class. *Cherokee Nation*, 199 F.R.D. at 361; Pet. App. 79a (noting that the *Cherokee Nation* court "did not discuss or rely upon" presentment).

The *Cherokee Nation* court ultimately denied class certification because, in its view, the commonality, typicality, and adequate representation requirements of Rule 23 were not met. *Id.* at 366. Such a ruling does not ordinarily preclude putative class members from

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through after-the-fact claims forms in *Ramah*, there is no reason why the same could not have held true in *Cherokee Nation*.

[6] *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007).

the benefit of class action tolling.[7] Indeed, class action tolling is generally "untethered . . . from any necessary connection to the reasons for denying certification." *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003). That makes perfect sense, as the policies underlying *American Pipe* do not hinge on the reason class certification is ultimately rejected. Thus, from the point in time when the *Cherokee Nation* class certification was denied until at least 2007, when the *Zuni* court denied class certification on presentment grounds,[8] Menominee had no reason to believe that lack of presentment would have excluded it from the *Cherokee Nation* class or from class action tolling on the basis of that action.[9]

c. In the absence of later rulings that class action tolling did not apply, Menominee would have benefited from the full class action tolling period to preserve its claims.

The Government objects that Menominee still could have filed within the original limitations period after certification was denied in *Cherokee Nation*. U.S. Br. 26. Given Menominee's reasonable belief that it was

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[7] See, *e.g.*, *Crown, Cork & Seal Co.*, 462 U.S. at 347-48 (recognizing class action tolling where the original class action had been denied on grounds of typicality, numerosity, and adequate representation); *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312 (D. Md. 1985).

[8] 243 F.R.D. at 443.

[9] The Government notes that Menominee does not challenge, in this case, the D.C. Circuit's determination in *Menominee II* that presentment was a prerequisite for class action tolling in this context. U.S. Br. 28. However, as the Tribe has noted, this Court has never ruled on that question. Pet. Br. 19 n.16. See also 561 U.S. 1026 (denying cert., *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) ("*ASNA I*")).

entitled to class action tolling, however, equitable tolling of the full class action tolling period is appropriate.[10]

Class action tolling "stops the clock" for the pendency of the action, up to the point of dismissal or denial of certification, leaving the claimant with the full remaining period once the running of the "clock" is resumed. *E.g.*, *American Pipe*, 414 U.S. at 561; *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) ("when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.") There is no requirement that claims be filed immediately after a period of class action tolling ends. *Abernethy v. United States*, 108 Fed. Cl. 183, 186-89 (2012); *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 178-80 (D. Mass. 2009).

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[10] The Government also argues that the Tribe's 1996 claim was untimely even assuming the limitations period was suspended for that length of time. U.S. Br. 39. That argument assumes that the 1996 claim accrued on December 31, 1996, but the accrual date is contested. It is the Tribe's position that the claim did not accrue until December 31, 1998, when the Tribe's contract actually expired and the IHS could no longer pay additional funds under the contract. See J.A. 47, 60 (annual funding agreement is incorporated into and becomes part of the underlying contract); J.A. 113 (modification to 1998 annual funding agreement dated September 23, 1998, adding funds for prior fiscal year 1997 covered by ongoing contract). Though the district court ruled against the Tribe on this issue, Pet. App. 38a, the D.C. Circuit did not address it since that court found that equitable tolling was unavailable in any event. The question of the accrual date for the 1996 claim is not now before this Court.

This is so even when a putative member of an uncertified class adopts a "wait-and-see" approach to determine the value of settlement, or to decide at a later date whether it wishes to intervene or file separate claims. *Abernethy*, 108 Fed. Cl. at 188 (rejecting the United States' position that plaintiffs "could have" filed individual claims or intervened in other actions within the original, un-tolled claims period, holding instead that class actions mechanically extend the claims period without such considerations). See also, *Arivella*, 623 F Supp. 2d at 179. Thus, Menominee's reliance on the full class action tolling period was part and parcel of its reasonable reliance on its right to class action tolling as a result of *Cherokee Nation*.

d. The confluence of the *Ramah* and *Cherokee Nation* class actions with later contrary rulings on presentment created extraordinary circumstances that justify equitable tolling.

The Government argues that neither the *Ramah* class action nor the apparent availability of class action tolling was an "extraordinary circumstance" that can justify equitable tolling under *Holland* because it was not an "impediment" and did not "prevent" Menominee from filing its claims. U.S. Br. 38-39. Those same arguments were rejected by the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) ("*ASNA II*"). The Federal Circuit correctly reasoned that the precedent set in *Ramah* with respect to presentment and class membership was one of the "unique facts and extraordinary circumstances" that justified equitable tolling in that case. Pet. App. 91a. As the D.C. Circuit recognized below, the facts of this case are analogous and the difference

in outcome is due to the D.C. Circuit's stricter interpretation of the *Holland* test, not to any factual distinctions between the cases.[11] Pet. App. 14a n.5.

The Government relies on and defends the D.C. Circuit's strict "external obstacle" test by arguing that "[t]he requirement of an external obstacle is reflected in the canonical formulation of the 'extraordinary circumstance' test[.]" U.S. Br. 22. From there, the Government reasons: "an extraordinary circumstance that could have 'stood in [the party's] way' (*i.e.*, interposed an obstacle or impediment) so as to 'prevent' the party from timely filing its claim logically requires circumstances beyond the party's control." U.S. Br. 22, quoting C.A. op., Pet. App. 10a (brackets in original).

Establishing that extraordinary circumstances must be "beyond the party's control" to justify equitable tolling does not provide support for the D.C. Circuit's "external obstacle" requirement, nor does it preclude equitable tolling on the facts of this case. Something may be beyond a party's control, but not strictly speaking an "external obstacle" that makes timely filing impossible in the way the D.C. Circuit seems to have required. This distinction is borne out by the cases cited by the Government itself. Some of those cases did not involve any external circumstances affecting a party's decision to file,[12] but others found

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[11] Notably, the Government did not seek this Court's review of the Federal Circuit's decision.

[12] See, *e.g.*, *Tucker v. Kingston*, 538 F.3d 732, 735 (7th Cir. 2008) (petitioner's lack of familiarity with the law not beyond his control); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), cert. denied, 534 U.S. 863 (2001) (counsel's confusion about applicable statute of limitations not beyond petitioner's control); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (counsel's

tolling based on circumstances that were clearly beyond the litigant's control but still did not stand as a direct obstacle that would bar or preclude filing.[13]

Requiring a specific "external obstacle" significantly and unreasonably narrows the circumstances under which equitable tolling can be found to apply, regardless of the equities, and does much more than simply restate the "extraordinary circumstances" test. The "canonical formulation" of the *Holland* test does not require such a rigid interpretation, which would be at odds with the equitable purpose of the test as described in *Holland* itself. 560 U.S. at 650.

Alternatively, the Government appears to assume that to "cause," "prevent," or "stand in the way of" as used in *Holland* means something akin to "make impossible," and therefore some "obstacle" logically must have stood as a substantive or procedural bar that actually precluded the claimant's ability to file. U.S. Br. 38-39 (simply asserting that *Ramah* did not "prevent" the Tribe from filing or "cause" the Tribe to miss the deadline). See also Pet. App. 18a ("none of the many factors the Tribe identifies are *external obstacles that prevented* the Tribe from bringing its claims") (emphasis added). But "prevent" is also defined

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erroneous interpretation of statute not beyond petitioner's control).

[13] See, *e.g.*, *Alvarez-Machain v. United States*, 107 F.3d 696, 700-01 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1997) (recognizing tolling where totality of circumstances, including "numerous, complex issues of first impression—several of which were ultimately decided by the United States Supreme Court," constitute circumstances beyond a petitioner's control); *Downs v. McNeil*, 520 F.3d 1311, 1324-25 (11th Cir. 2008), cert. denied, 135 S. Ct. 70 (2014) (recognizing tolling where attorney lying to client about important legal fact was beyond client's control).

as "to deprive of power or hope of acting or succeeding."[14] "Prevent" can mean not only to "stop," but also to "hinder or impede."[15] BLACK'S LAW DICTIONARY (10th ed. 2014).

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[14] See *Prevent Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/prevent (last visited Nov. 16, 2015).

[15] Nothing in the formulation of the equitable tolling rule in *Holland* or other cases suggests that the term "prevented" should be interpreted so narrowly as to require a showing that timely filing was *impossible*. The term "prevented" is not part of this Court's original formulation of the two-part equitable tolling test in *Pace v. DiGuglielmo*, and thus the attribution of that language to *Pace* in *Holland* appears to be in error. See *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."); *Holland*, 560 U.S. at 649 (citing *Pace* and noting "emphasis deleted," although there was no emphasis in *Pace*). Rather, the term "prevented" first appears to have been used by this Court in *Lawrence v. Florida*, 549 U.S. 327, 336 (2007), in which the petitioner sought to toll the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1). Pursuant to that statutory provision, the start of the one-year limitations period may be delayed until "the date on which the *impediment* to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was *prevented* from filing by such State action." 28 U.S.C. § 2244(d)(1)(B) (emphasis added). See also *Lawrence*, 549 U.S. at 337 (noting that "Lawrence has not alleged that the State *prevented* him from hiring his own attorney or from representing himself.") (emphasis added). The narrow statutory meaning of "prevented" as used in § 2244(d)(1)(B) is not applicable to equitable tolling cases arising under completely different circumstances outside the AEDPA, and there is no reason to suppose that this Court's use of the word "prevented" in *Holland* was meant to import the statutory requirements of § 2244(d)(1)(B).

Here, even though no obstacle made it *impossible* for the Tribe to file its claims at an earlier time, it was hindered from timely filing by events outside of its control. The Tribe reasonably relied on class action tolling, but later rulings rendered such tolling inapplicable. Those rulings were contrary to the law at the time of filing, and to Menominee's own experience in the *Ramah* class. To deny the Tribe the benefit of equitable tolling based on those later rulings would contravene the very policies that gave rise to the *American Pipe* tolling rule in the first place. And to do so in a context where the underlying statutory right to recover reflects Congress' judgment that tribes have no margin to pay administrative fees would produce highly inequitable results.

II. Filing individual claims was not the easy or inexpensive failsafe measure claimed by the Government.

Regardless of the apparent availability of class action tolling, the Government argues that the diligence necessary for *equitable* tolling required Menominee to file earlier than it did. The Government wrongly dismisses both the "perceived futility" of filing administrative claims and the "risk and expense" of the necessary step of pursuing those claims in litigation. U.S. Br. 40. Those factors, combined with Menominee's reasonable reliance on *Ramah* and *Cherokee Nation*, further contributed to the extraordinary circumstances faced by the Tribe.

The Government has not contested that the IHS surely would have denied Menominee's administrative claims, as it eventually did. A contracting officer's denial triggers a ninety-day deadline to appeal the decision to the agency's Board of Appeals, 41 U.S.C. § 7104(a), or a one-year deadline to file an appeal with

the Court of Claims or a federal district court. 41 U.S.C. § 7104(b); 25 U.S.C. § 450m-1(a). The Government does not contest the fact that Menominee, once its claims were denied, would have had to pursue those appeals in order to preserve its claims. Pursuing individual claims would also have jeopardized Menominee's class membership in the *Cherokee Nation* and, later, *Zuni* class actions.[16] Thus, the Government cannot seriously dispute that filing individual claims entailed much more than an "envelope and a stamp" and did not offer the Tribe a clear path forward given the uncertain legal environment.

The Government's primary response is that "[a]dopting the Tribe's position would establish an unprecedented rule allowing a litigant to ride the coattails of existing litigation and excuse its untimeliness on an open-ended basis until after the validity of its claim was conclusively established." U.S. Br. 40. That is a gross exaggeration, as Menominee seeks tolling only of the time period that class action tolling would have

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[16] There has been some dispute over whether the Government initially took the position in *Cherokee Nation* that the filing of individual claims would render such tribes ineligible for the class, only to reverse course later in *Zuni*, where the Government argued that presentment was a necessary prerequisite. *Compare Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99 (D.D.C. 2012) (Pet. App. 34a-35a), *with Arctic Slope Native Ass'n v. Dep't of Health & Human Servs.*, 11-2 B.C.A. (CCH) ¶ 34,778 (C.B.C.A. 2011) (Bd. J. Steel, dissenting) (finding that the Government changed its litigation position regarding presentment). In any event, pursuing individual appeals certainly would have threatened Menominee's class membership status, and it was not clear that those appeals could be delayed or avoided without penalty after filing at the administrative level. See Pet. Br. 44-46.

allowed—not an "open-ended" period. Moreover, the circumstances of this case are undeniably exceptional.

First, the Tribe's claims resulted from an agency-wide practice involving hundreds of other tribes, with thousands of individual claim years. See *Cherokee Nation*, 199 F.R.D. at 361. The dispute over the extent of the Government's liability for contract support cost shortfalls was a topic of national interest and was being litigated in multiple forums. Both the IHS and the BIA vigorously and consistently denied liability and sought to minimize their responsibilities under the ISDA. See generally, Br. of Nat'l Cong. of Am. Indians as Amicus Curiae Supporting Petitioner.

The Government's demand that every individual tribe present administrative claims on common theories that the IHS had already rejected, and then pursue individual lawsuits to test those same theories, is a self-serving, *post hoc* claim. It strains credulity that the Government actually wanted every tribe to initiate costly and futile administrative proceedings. And there is no doubt that Congress—which acted because Tribes could not afford to shoulder administrative costs and because the agencies had repeatedly violated the letter and spirit of the ISDA—would not have wanted the tribes to undertake this costly and futile effort.

Contrary to the Government's assertions, this was a rare case where pursuing an individual suit was *not* "the only sure way to determine" whether such a suit "could be maintained to a successful result." U.S. Br. 20 (citing *Versluis v. Town of Haskell*, 154 F.2d 935, 943 (10th Cir. 1946)). Pursuing an individual lawsuit would only have wasted time and resources in the lower courts and would not have changed the outcome, which was necessarily dictated by this Court's 2005 decision in *Cherokee*. The Tribe's decision to use the

class action tolling period to determine whether the Court's decision would validate its claims or invalidate them thus shows no lack of diligence on its part.

Second, this case is unique because the Tribe's lack of resources is partly attributable to the failure of the Government to pay the Tribe's contract support expenses—the very subject of the claims. Menominee was a poor tribe made poorer by the Government's failure to live up to its statutory responsibilities and contractual obligations. This was one of the extraordinary circumstances that justify equitable tolling in this case.[17]

The Government responds that the Equal Access to Justice Act ("EAJA") is designed to alleviate any concerns over the cost of litigating ISDA contract claims, and therefore the burdensome expense of litigation should not even be considered. U.S. Br. 44. In fact, the EAJA is narrowly designed to deter the Government from taking an unreasonable litigation position and to avoid punishing a litigant with the costs arising from the Government's unreasonable behavior. Accordingly, a party seeking an award of fees under the EAJA must "allege that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). Given the state of the contract support cost litigation landscape at the time, the Tribe could hardly have assumed that it would be awarded EAJA fees, even if it qualified as a party eligible

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[17] The Tribe's financial problems were compounded by the fact that the BIA followed the same practices as the IHS in failing to pay the Tribe's contract support expenses. The BIA's actions are the subject of claims by the Tribe as a member of the *Ramah* class action.

to recover fees under that statute. See 28 U.S.C. § 2412(d)(2)(B).

The futility of filing administrative claims or the expense and uncertainty of litigation may not be enough on their own to excuse Menominee's delay in filing, nor did Menominee rely on those factors alone. They are, however, relevant to the equitable analysis and they did impact Menominee's decision not to file *early*, before the time period as extended by class action tolling had run and while the question of liability was pending with this Court. Only after *Zuni* and the Federal Circuit and D.C. Circuit decisions on presentment was it established that Menominee had thereby unwittingly missed the filing deadline. Prior to those rulings, Menominee's course of action was reasonable and, most importantly for equitable tolling purposes, reasonably diligent.[18]

III. The Government would not be prejudiced by consideration of the Tribe's claims on the merits, since the Government had ample notice of their existence.

The Government would in no way be prejudiced by equitable tolling of the class action tolling period in this case. The IHS was put on clear notice by both the *Cherokee Nation* and *Zuni* class actions, the latter of which was still pending in 2005 when Menominee submitted its individual claims. *ASNA II*, Pet. App. 90a; *Crown, Cork & Seal Co.*, 462 U.S. at 352. The Government is wrong in asserting that these class actions were not sufficient to put the IHS on notice of Menominee's *specific* claims; in fact, Menominee and its potential shortfall damages were individually and

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[18] See Pet. Br. 39 n.30.

specifically listed on the IHS's own shortfall reports, which formed the basis for the *Cherokee Nation* class. *Cherokee Nation*, 199 F.R.D. at 359, 361.

In those reports, the IHS calculated contract support cost shortfalls at the individual tribal level by subtracting the amounts actually paid from the full amount produced by application of the Tribe's indirect cost rate to its contract base funding. J.A. 237-38. Menominee used the same methodology to calculate its shortfall damages in its administrative claims. See Lodged Materials 1-10 (Menominee's requests for Contracting Officer's Decision, referencing the IHS shortfall reports). The IHS was thus fully aware of the existence, basis, and the approximate amount of Menominee's claims as a result of the *Cherokee Nation* class claims.

The Government asserts that it could not have been on notice of the Tribe's claims because the Tribe executed a "release" of those claims. U.S. Br. 48-49. This assertion relies on boilerplate forms that were presented to non-lawyer employees of the Tribe as a routine close-out document when the Tribe's contract covering 1996 through 1998 ended. See J.A. 126, 240-43. At the time, the IHS represented to Menominee that "In order to close out this contract," the form "*must* be signed by officials of your organization and returned to this office." Ex. G, Mem. in Opp. to Mot. to Dismiss, D. Ct. Docket entry No. 36-1 (June 3, 2011) (cover letter sent with claim release forms) (emphasis added).

The effect of the purported release is an issue that has not yet been considered by the district court. However, the purported mandatory release was not legally effective because it is contrary to the ISDA. The Government may not require or benefit from a

contract provision that violates a federal statute,[19] and a member of a statutorily protected class cannot contract away its statutory rights.[20] If anything, the purported release only illustrates the IHS's abuse of authority and disregard of its statutory and fiduciary responsibilities under the tribal-federal relationship as embodied in the ISDA.

Given that the Government had ample notice of the Tribe's claims, it can show no prejudice that would result from the tolling of the statute of limitations.[21] On the other hand, in the absence of tolling Menominee will be deprived of the opportunity to vindicate its statutory and contractual rights under the ISDA.

CONCLUSION

Menominee's reliance on the class action tolling period in this case was reasonable and justified. Equitable tolling is appropriate to avoid an unjust result in light of the Tribe's reasonable diligence and

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[19] *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1185-86 (Fed. Cir. 1988); *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995).

[20] See, *e.g.*, *Burnside-Ott Aviation Training Ctr. v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir. 1997); *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 704-05 (1954). The purported release was also void for lack of consideration and was likely unconscionable. See *Maynard v. Durham & S. Ry. Co.*, 365 U.S. 160, 162-63 (1961); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 251-53 (S.D.N.Y. 2005).

[21] The Government suggests that it would be prejudiced by tolling because the "central purpose" of the statute of limitations is "repose." U.S. Br. 50. That could be said in every tolling case and is tantamount to saying that tolling would prejudice the government by subjecting it to the possibility of losing on the merits. If that were true, tolling would never be possible. *Griffin v. Rogers*, 399 F.3d 626, 638 (6th Cir. 2005).

the extraordinary circumstances it faced. For these reasons, and to preserve the public policies underlying *Holland* and *American Pipe*, Menominee respectfully requests that this Court reverse the ruling of the D.C. Circuit below.

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In The Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest tribal government organization in the United States.[1] NCAI serves as a forum for consensus-based policy development among its membership of over 250 tribal governments from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal legislative and policy issues affecting tribal governments. NCAI and its members have considerable experience with the history and operation of contracts between the federal government and tribes under the Indian Self-Determination and Education Assistance Act of 1975.

This Court recently has twice examined the claims of tribal contractors under the Indian Self-Determination Act for payment in full by the government of costs to support the contracts. In both cases, *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), and *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012), the Court rejected the government's non- or under-payment arguments as contrary to the Act's full payment mandate. In both *Cherokee* and *Ramah*, NCAI filed *amicus curiae* briefs to assist the Court in

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[1] No counsel for any party authored this brief in whole or in part. No one other than *amicus curiae* made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of the brief, and letters of consent have been filed with the Clerk.

understanding the Act's history and federal Indian policy with respect to tribal contract support cost claims. NCAI submits this *amicus* brief in the present case in order to demonstrate why the historic and unique relationship between tribes and the federal government that is embedded in the Indian Self-Determination Act should be a factor when equitable tolling is considered for application to the timeliness of such claims.

SUMMARY OF ARGUMENT

The Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975), *codified as amended at* 25 U.S.C. §§ 450 *et seq.*, allows Indian tribes as sovereigns to contract the operation of federal programs and services provided to Indian people. The Act is the modern centerpiece of "the Federal government's historical and special legal relationship with, and resulting responsibilities to, American Indian people. . . ." 25 U.S.C. § 450(a). Widely-heralded as a groundbreaking departure from antiquated and failed federal Indian policies when it was enacted, from its outset the Self-Determination Act has met with continuing resistance to its full implementation by federal bureaucrats. "[T]he success of the self-determination policy urged by previous Republican administrations . . . provided . . . meaningful changes in [federal] Indian policy [but] . . . problems . . . have developed in the [Act's] implementation. . . ." *Oversight of Indirect*

Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs, 97th Cong., at 1 (1982). To protect their own responsibilities and resources, federal agencies delayed or denied contracts to tribes, and they refused to pay in full the costs to tribes to support their contracts. *See generally* S. Rep. No. 100-274, at 6-13 (1987). "The federal service bureaucracy that was supposed to be reduced as tribes assumed control of programs has been replaced by a contract monitoring bureaucracy." *Id.* at 7. This resulted in tribal reluctance to contract as well as tribes subsidizing the costs of operating the contracts. *Id.* at 8-9; *see also Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs*, 97th Cong., at 1-2 (1982).

Congress has repeatedly responded to the bureaucratic efforts to obstruct the implementation of the Act's core provisions. Amendments to the Act in 1988 and 1994 fortified tribal self-determination contracting, enabled contract enforcement, and expressly provided for full payment to tribes of all contract amounts, including contract support costs. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108 Stat. 4250 (1994). To achieve the Act's goal of contractually transferring the operation of key federal

Indian services and programs to tribes, Congress employed both general government contract law protections, and special safeguards for tribal contractors rooted in the inter-governmental federal-tribal relationship.

As this Court is well-aware, Congress' efforts did not deter agency defiance of statutory directives. In particular, claims by tribal contractors for full support cost payment led to the Court's decisions in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), and *Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181 (2012), which establish federal liability for full payment. *Cherokee* and *Ramah* acknowledge the Act's full payment mandate. *Cherokee*, 543 U.S. at 634, *citing* 25 U.S.C. §§ 450j-1(a)(1) and (2); *Ramah*, 132 S.Ct. at 2186, *citing* 25 U.S.C. § 450j-1(a)(2), (g). They reason that the government contract law provisions incorporated into the Act suffice to enforce that mandate, *Ramah*, 132 S.Ct. at 2189 (Cherokee held that "the Government was obligated to pay the Tribes' contract support costs in full [and this conclusion] followed directly from well-established principles of Government contracting law."), while also relying on the Act's special pro-tribal rules of contract and statutory interpretation. *Id.* at 2187, 2193.

At issue here is the government's latest iteration of Self-Determination Act contract resistance. In an effort to reduce its liability, the government raises statute of limitations defenses to certain tribal support cost full payment claims. Against such procedural arguments, the Tribe argues for equitable tolling.

The Court of Appeals correctly reasoned that equitable tolling should apply, but then expressly refused to give any consideration to the unique federal-tribal relationship in analyzing equitable tolling. *Menominee Indian Tribe v. United States*, 764 F.3d 51, 62 (D.C. Cir. 2014). On this point, the Court of Appeals below erred. That refusal directly conflicts with *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289, 1297-1298 (Fed. Cir. 2012), which specifically ruled that federal courts should take into account the federal-tribal relationship in determining whether equitable tolling is warranted in a Self-Determination Act contract support case. The federal-tribal relationship appropriately is a factor in the equitable tolling analysis because the relationship is the basis of significant statutory protections for tribal contractors against agency contract resistance and violations.

ARGUMENT

I. THE BASIS FOR THE INDIAN SELF-DETERMINATION ACT IS THE HISTORIC AND UNIQUE RELATIONSHIP BETWEEN THE UNITED STATES AND INDIAN TRIBES

A. The United States Has Historically Recognized A Unique Relationship With Indian Tribes

From its inception, the United States has had official government-to-government relations with

Indian tribes. *See, e.g., Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685, 687 n.4 (1965) (first United States treaty with an Indian tribe was in 1778). In addition to the Constitutional provisions in Article I, *see United States v. Lara*, 541 U.S. 193, 200-201 (2004), "for much of the Nation's history, treaties, and legislation made pursuant to those treaties, [have] governed relations between the Federal Government and the Indian tribes." *Id.* at 201 (citation omitted). Decisions of this Court likewise have defined aspects of the federal-tribal relationship now for "[t]wo centuries. . . ." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2040-2041 (2014) (Sotomayor, J., concurring). Federal law and policy concerning relations with tribes has passed through many phases over time, *see United States v. Lara*, 541 U.S. at 202, including those with "tragic consequences" such as "removal," "assimilation" and "termination," *id.*

B. The Federal-Tribal Relationship Is Firmly Incorporated In The Indian Self-Determination Act

Many aspects of federal-tribal relations today are governed by the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* Congress and this Court rightly attribute the Act's genesis to President Nixon. *See, e.g.*, S. Rep. No. 108-413, at 1 (2004) (the Act affirmed President Nixon's "rationales for a new, more enlightened Federal Indian policy: Indian Self-Determination."); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458

U.S. 832, 840 & n.1 (1982) (*citing* President Nixon's Special Message to Congress on Indian Affairs, of July 8, 1970, as triggering the historic shift in federal policy that led to the Act); *see also* 161 Cong. Rec. E1017-05 (July 8, 2015) (Speech of Rep. Cole, R-OK, Commemorating the 45th Anniversary of President Richard M. Nixon's Special Message to Congress on Indian Affairs, and acknowledging that Congress responded with the Indian Self-Determination Act). Formally recognized as "milestone" legislation when it was enacted, see Statement of President Ford on Signing the Indian Self-Determination and Education Assistance Act (Jan. 4, 1975), available at http://www.presidency.ucsb.edu, the Act remains "one of the most important legislative acts affecting Indian country of the last four decades." S. Rep. No. 114-060, at 2 (2015).

The Indian Self-Determination Act expressly and prominently incorporates the federal-tribal relationship. "Congress [has carefully reviewed] the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people. . . ." 25 U.S.C. § 450(a) (Congressional statement of findings). "Congress declares its commitment to the maintenance of the Federal government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole. . . ." 25 U.S.C. § 450a(b) (Congressional declaration of policy). Legislative history confirms Congress' specific reliance on the federal-tribal relationship as the Act's foundation. H.R. Rep. No. 93-1600 (1974), *reprinted in* 1974

U.S.C.C.A.N. 7775, at 7781 (the new federal policy of Indian self-determination is "consistent with the maintenance of the Federal trust responsibility and the unique Federal-Indian relationship.").

C. The Self-Determination Act Provides For Tribal Contracting Of Federal Responsibilities To Indians Such As Health Care

The Indian Self-Determination Act "authorizes the Government and Indian tribes to enter into contracts in which the tribes promise to supply federally funded services" formerly provided by the government. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 634 (2005); *see also Salazar v. Ramah Navajo Chapter*, 132 S.Ct. 2181, 2186 (2012) (the Act directs agencies "to enter into contracts with willing tribes, pursuant to which those tribes will provide services such as education and law enforcement that otherwise would have been provided by the Federal Government."). As *Cherokee* and *Ramah* aptly recognize, Self-Determination Act contracts are the modern mechanism for tribal operation of federal services and programs undertaken by the government for Indians.

Indian health care is an established and significant federal responsibility. "Federal health care for Indian people began . . . [i]n the early 1800s. . . ." *The First 50 Years of the Indian Health Service: Caring & Curing*, at 7 (2005), available at http://www.ihs.gov/newsroom/factsheets. As with other federal Indian obligations,

> [t]he cession of most of the lands in the United States by the Indians, codified in hundreds of treaties, forms the basis for the Government's provision of health care to Indians. Many treaties identified health services as part of the Government's payment for Indian land. Indian treaties were contracts between the Federal and Tribal Governments. Indian Tribes gave up their land in return for payments and/or services from the U.S. Government.

The First 50 Years of the Indian Health Service: Caring & Curing, at 8; *accord id.* at 13 ("The earliest Federal services provided to Indians were based on treaties and were intended to compensate Indians for the land cessions and other benefits granted to the United States."); *see also* Indian Health Service, Agency Overview, http://www.ihs.gov/aboutihs/overview ("The provision of health services to members of federally-recognized Tribes grew out of the special government-to-government relationship between the federal government and Indian Tribes . . . established in 1787, . . . based on Article I, Section 8 of the Constitution, and . . . numerous treaties. . . .") .

In addition to treaties, the Snyder Act, 42 Stat. 208 (1921), *codified* at 25 U.S.C. § 13, "is the basic [statutory] authorization for Federal health services to U.S. Indian tribes." *The First 50 Years of the Indian Health Service: Caring & Curing*, at 8. Further, the Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, 90 Stat. 1400 (1976), *codified as amended at* 25 U.S.C. §§ 1601 *et seq.*, passed virtually

contemporaneously with the Indian Self-Determination Act, authorized additional funding, and consolidated existing and added new Indian health services and programs. "The Indian Health Care Improvement Act . . . [currently is] the cornerstone legal authority for the provision of health care to American Indians and Alaska Natives." Indian Health Service, Legislation, http://www.ihs.gov/aboutihs/legislation. The Indian Health Care Improvement Act expressly finds that "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. § 1601(1).

With over 560 federally-recognized tribes and 2.2 million American Indians and Alaska Natives nationwide, federal appropriations in fiscal year 2015 to the Indian Health Service were $4.6 billion. http://www.ihs.gov/newsroom/factsheets/ihsyear2015profile. Over half of this appropriation amount is contracted or otherwise administered by tribes across the country through the Indian Self-Determination Act. *Id.*

II. THE SELF-DETERMINATION ACT'S STRONG PROTECTIONS FOR TRIBAL CONTRACTORS ARE BASED ON BOTH GOVERNMENT CONTRACT LAW AND THE UNIQUE FEDERAL –TRIBAL RELATIONSHIP

Notwithstanding its congressionally, presidentially – and tribally – heralded goals, the Indian

Self-Determination Act's implementation has been impeded at the agency level primarily because proper implementation would implicate the bureaucrats' interest in their own jobs. Unrelenting views and tenacious resolve have pushed and pulled the Act's implementation issues and reform efforts through many fora for many years. Above all, considerable federal, tribal, congressional and judicial efforts have been expended addressing "the Government's fiscal obligations with respect to . . . ISDA's . . . contract support costs. . . ." *Ramah*, 132 S.Ct. at 2195. Contract support costs generally are the reasonable administrative and overhead costs associated with carrying out Self-Determination Act contracts. *See* 25 U.S.C. § 450j-1.

A. Federal Agencies Quickly Took Advantage Of The Act's Failure Originally To Provide For Contract Support Costs

The Act did not originally expressly provide for contract support costs. *See* Pub. L. No. 93-638, 88 Stat. 2203 (1975). "As originally enacted, [the] ISDA required the Government to provide contracting tribes with an amount of funds equivalent to those that the Secretary 'would have otherwise provided for his direct operation of the programs.'" *Ramah*, 132 S.Ct. at 2186. As indirect cost calculation issues and funding shortfalls emerged, "[i]t soon became apparent that this secretarial amount failed to account for the full costs to tribes of providing services." *Id.*; *see also Oversight of Indirect Costs and Contract Provisions*

of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs, 97th Cong., at 1 (1982) (first oversight hearing on the Act's implementation focused largely on contract indirect cost problems).

The two main contracting agencies, the Bureau of Indian Affairs and the Indian Health Service, did little more than proffer or tinker with various budgetary measures, procedural guidelines, policies, systems and approaches. *See, e.g., Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs*, 97th Cong., at 2-29 and 14 (Statement of Kenneth L. Smith, Assistant Secretary for Indian Affairs, Department of the Interior and Statement of Dr. Joseph N. Exendine, Deputy Director, Indian Health Service, urging Congress to replace Self-Determination Act program contracting with grants, which the committee chairman questioned as a viable means of decreasing the bearing of indirect costs by tribes); U.S. Gen. Accounting Office, GAO/HRD-86-99, Rep. to S. Select Comm. on Indian Affairs, *Indian Health Service: Contracting for Health Services Under the Indian Self-Determination Act*, at 33 (Sept. 1986) (April 1986 Indian Health Service announcement of "pilot project" for a more rational, equitable, and consistent policy for determining and allocating indirect costs and funding).

Left to their own discretion, and in the interests of their own jobs and bureaucracy, the agencies

ignored or rejected reports, recommendations, and other assistance offered by the Interior Department's Office of Inspector General, the Office of Management and Budget, and a Presidential Council on Integrity and Efficiency, as well as by tribes and Indian organizations, to meaningfully address and ensure payment of contract support costs in full. *See* NCAI, National Policy Workgroup, *Contract Support Costs Final Report*, at 16-18 (July 1999).[2] Consequently, as contract support cost issues mounted in numbers and dollar amounts, tribal contractors began to file administrative appeals and court cases. *See, e.g., Alamo Navajo Sch. Bd.*, 1988 WL 44359 (Interior B.C.A., Feb. 24, 1988); *Tanana Chiefs Conf. v. Heckler*, No. 84-1756, 11 Indian L. Rep. 3093 (D.D.C. 1984) (memorandum opinion).

B. Congress Responded With Amendments Mandating Contract Support Cost Payments

Following hearings in May 1986 and April 1987, Congress prepared to curtail agency discretion and force full contract support cost funding. In the Senate, amendments were introduced to "strengthen . . .

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[2] In 1998 NCAI formed a National Policy Workgroup on Contract Support Costs. The Workgroup's Final Report (1999) is available at http://www.ncai.org/policy-issues/tribal-governance/Final_Report_on_CSC_July1999.html. The Report sets forth in great detail agency resistance to contract support cost funding and other issues during the years 1975-1999.

Indian self-determination while maintaining accountability for Federal funds," because, "[a]lthough the act has been, for the most part, a success, there have been problems." 133 Cong. Rec. S12395-02 (1987) (Statement of Senator Evans, R-WA, regarding S. 1703, a bill to amend the Act). Among them:

> Federal agencies have failed to pay their fair share of indirect costs for self-determination contracts. This has resulted in many tribes subsidizing Federal contract administration costs, and foregoing opportunities for economic development.

Id.

> By strengthening and clarifying congressional intent, we can do a lot for helping Indian tribal administrators to focus their attention on serving their people rather than constantly doing battle with Federal bureaucrats who want to bicker over responsibilities, funding, and oversight. If we are successful, we may actually reduce the bureaucracy and enhance the position of Native Americans to direct their own lives.

Id. (Statement of Senator Domenici, R-NM).

The Senate's Executive Summary of S. 1703 noted that when the Act was originally passed,

> [l]ittle was understood about indirect costs by the high level bureaucrats in these agencies. While Tribes struggled to gain administrative expertise, these agencies (which employed in excess of 28,000 people) did

> little to support the Tribes in dealing with the complexities of indirect costs. To date, neither agency has provided even one full-time position to assist Tribes in addressing this critical technical issue. Rather than addressing this contractual problem in a direct and effective manner by advocating sufficient funding, the two agencies, have attempted to bypass the problem by failing to request necessary operational funds and attempting to reduce or limit the recovery of legitimate indirect costs by Tribes.

133 Cong. Rec. S12395-02 (Executive Summary). The Executive Summary continued that, "[w]hile it seems ludicrous and ironic that the agenc[ies] responsible for implementing the intent of the Self-Determination Act would not only fail to advocate it but would actually work to undermine the establishment of strong and effective Tribal governments, it is nevertheless obvious that this" is what in fact has happened. *Id.*

> The . . . provisions of Section 106(h) of the Act have not been met. Neither the Secretary of the Interior nor the Secretary of Health and Human Services has developed a system that complies with that section of the law. That is to say, Tribes have been allocated *less* funds than the government would have spent for federal operation of the same program.

Id. (emphasis added).

Ultimately, Congress made clear that "the single most serious problem with implementation of the

Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts." S. Rep. No. 100-274, at 8 (1987). "It must be emphasized that [under Indian Self-Determination Act contracts] tribes are operating federal programs and carrying out federal responsibilities. . . ." *Id.* at 9. Because "[f]ull [federal] funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed," *id.* at 13, the 1988 Amendments would require payment of contract support costs, prohibit agencies from reducing such costs except under certain narrow conditions, and require the agencies to add the costs to their annual requested funding levels for contracts. Pub. L. No. 100-472, § 205, 102 Stat. 2285, *codified as later amended at* 25 U.S.C. § 450j-1(a) & (b); *see also* 134 Cong. Rec. S6943-01 (1988) (Debate on S. 1703, Indian Self-Determination Act amendments, Sec. 205, Contract Funding and Indirect Costs). Agencies also would be required to submit annual reports to Congress on contract support cost shortfalls and other issues by April of each year in time for the supplemental appropriation process. *See* 25 U.S.C. § 450j-1(c). Over strong agency objections to many of the contract support cost terms and other key aspects of the bill, *see* S. Rep. No. 100-274, at 43-58 (Statement of Ross O. Swimmer, Assistant Secretary-Indian Affairs, Department of the Interior, and Statement by Everett R. Rhoades, M.D., Director, Indian Health Service, Public Health Service), the

1988 Amendments were enacted. Pub. L. No. 100-472, 102 Stat. 2285 (1988).

As noted *supra*, Congress was skeptical of and ultimately rejected the agencies' proposal to turn Self-Determination Act contracts into federal grant programs. *Oversight of Indirect Costs and Contract Provisions of the Indian Self-Determination and Education Assistance Act: Hearing before the S. Select Comm. on Indian Affairs*, 97th Cong., at 2-29.

> The differences between self-determination contracts, grants, and cooperative agreements were the subject of extensive discussions with the tribes. The Committee considered deleting the term "contract" and using another term such as "self-determination grant" or "intergovernmental agreement." Ultimately, however, the Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the legal consequences that would be associated with the termination of contractual obligations by either party. Furthermore, the Committee believes that the retention of the term "contract" is consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.

S. Rep. No. 100-274, at 19. The application of the Contract Disputes Act to Self-Determination Act contracts afforded "self-determination contractors the

procedural protections now given other federal contractors by that Act," including enforceable deadlines for agency contract dispute decisions, and "favorable treatment as to interest on amounts in disputes." *Id.* at 36; *see* 25 U.S.C. § 450m-1(d).

But in addition to providing Self-Determination Act contractors with procedural rights available to other government contractors via the Contract Disputes Act, the 1988 Amendments added critical protections for tribal contractors that other government contractors do not have. These include federal district court original jurisdiction over civil claims for injunctive relief to remedy agency violations, and original and concurrent jurisdiction for money damages claims arising under the Act in both federal district courts and what is now the U.S. Court of Federal Claims. *See* 25 U.S.C. § 450m-1(a). Moreover, "all agency action" arising under the Act is subject to judicial review, *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1344 (D.C. Cir. 1996), *citing* 25 U.S.C. § 450m-1(a) and S. Rep. No. 100-274, at 37 These additional protections were deemed necessary for tribal contractors because the transfer of federal responsibilities to tribes contemplated by the Act had been so hindered by agency "policies which have interfered with the contractual relationship contemplated by the Act between the Federal Government and tribal governments." S. Rep. No. 100-274, at 7.

The 1988 Amendments thus demonstrate Congress' "double layer" of protections for Self-Determination

Act contractors, and they were specifically and sharply tied to agency contract support cost transgressions.

> The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

S. Rep. 100-274, at 37.

C. Continued Agency Resistance Led To Further Amendments With Unique Protections For Tribal Contractors

Stunningly, agency resistance continued unabated after the 1988 Amendments. New agency regulations which Congress had required within a year were delayed until 1994. When published, the proposed regulations were far from being "relatively simple, straightforward, and free of unnecessary requirements or procedures." S. Rep. No. 103-374, at 2 (1994). Instead, they contained "hundreds of new requirements," and were in many instances "more restrictive than existing regulations and rais[ed] new obstacles and burdens for Indian tribes." *Id.* at 3. This situation prompted Congress to act once again, passing the Indian Self-Determination Contract Reform Act of 1994, Pub. L. No. 103-413, tit. I, 108

Stat. 4250 (1994); *see also* S. Rep. No. 103-374, at 14 (agency delay in promulgating and nature of regulations are an "unfortunate experience that is a major impetus for this bill.").

Building on the 1988 tribal contractor protections, the 1994 Amendments enhanced the tribes' protections based on the unique federal-tribal relationship underlying the Self-Determination Act. The overall "objective [was] to assure that there is no diminution in program resources when [federal] programs, services, functions or activities are transferred to tribal operation." 140 Cong. Rec. H11140-01 (1994). This would be accomplished by "circumscrib[ing] as tightly as possible" any remaining agency discretion with respect to contracting matters. *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d at 1344.

To eliminate agency discretion and regulatory authority, the 1994 Amendments begin with new mandatory "model" contract terms which agencies are prohibited from altering absent tribal consent. 25 U.S.C. § 450*l*(a)(1); *see also* S. Rep. No. 103-374, at 3 (1994 Amendments "prescribe[] the terms and conditions which must be used in any contract . . . thereby eliminating the need for regulations [and agencies] are no longer vested with authority to promulgate regulations under the Act."). Foremost among the model terms is a special rule of construction for the Act and its contracts, 25 U.S.C. § 450*l*(c) ("Each provision of the Indian Self-Determination and Education Assistance Act and each provision of this Contract shall be liberally construed for the

benefit of the Contractor. . . ."), a provision this Court found important in its *Ramah* decision, 132 S.Ct. at 2187 and 2193. This critical provision echoes this Court's federal Indian law canons of construction and demonstrates vividly how the Act's contract terms are rooted in the unique federal-tribal relationship, *see e.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149 (1984) ("it is a settled principle of statutory construction that statutes passed for the benefit of . . . Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of the Indians"); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them"). The model terms also provide for forced contract award amounts and mandatory funding levels, 25 U.S.C. §§ 450j-1(a)(3)(B); 450j-1(b); 450j-1(g); 450*l*(c)-(b)(4) and (b)(9), and give contractors – not the agencies – the choice of whether contract payments will be in quarterly, semiannual or annual lump-sum amounts, 25 U.S.C. § 450*l*(c)-(b)(6)(B).

The 1994 Amendments also expedite tribal contractor access to federal district courts for injunctive relief upon an agency's refusal to contract or refusal to fund a contract, 25 U.S.C. §§ 450f(b)(3) and 450m-1(a). In the pursuit of administrative claims, the burden of proof regarding an agency's refusal to contract or an agency's rescission of a contract is on the agency, not the contractor. *Id.* at §§ 450f(e) and 450m. Similarly, the burden of proof is on agencies in

the event of any suspension, withholding or delay of contract funding payments, *id.* at § 450j-1(l)(2), and the agencies' rights to suspend or withhold funds are statutorily limited, *id.* at § 450j-1(l)(1). These are just some of the many Self-Determination Act provisions that are unheard of in routine government contract law.

Under the 1994 Amendments, Self-Determination Act contracts also are generally immune from agency rules and regulations, 25 U.S.C. § 450k; *see also Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d at 1344 (agencies are prohibited from promulgating any regulations not expressly allowed by the Act), and from agency "program guidelines, manuals, [and] policy directives," 25 U.S.C. § 450*l*(c)-(b)(11). Further, other than the Contract Disputes Act provisions already specifically incorporated into the Act, the 1994 Amendments make clear that Self-Determination Act contracts are altogether *exempted* from the federal procurement system and other routine general government contract laws, 25 U.S.C. §§ 450b(j) and 450j(a)(1). On the other hand, Self-Determination contracts are subject to special tribal employment and contract preference laws, 25 U.S.C. § 450e(c). Tribal contractors also enjoy special limited audit requirements, 25 U.S.C. § 450c(f), and agency monitoring activities are strictly limited, 25 U.S.C. § 450*l*(c)-(b)(7)(C). All of these provisions place these contracts at a distance from routine government contracts and show that remedial rights under the

Contract Disputes Act are a floor, not a ceiling on the rights tribes enjoy vis-à-vis federal agencies.

These are some of the extraordinary safeguards Congress found necessary to enact to protect tribal contractors from federal agency resistance to the Act's contracting mandates, and they are based on the federal-tribal relationship embodied in the Act. "[T]he ISDEA's legislative history is replete with references to agency malfeasance in the ISDEA contracting process." *Navajo Health Found. – Sage Mem'l Hosp. v. Burwell*, No. CIV-14-0958, slip op. at 65 (D.N.M. Aug. 31, 2015), *citing Navajo Health Found. – Sage Mem'l Hosp. v. Burwell*, 2015 WL 1906107, at *50-52 (D.N.M. Apr. 9, 2015). "[N]early every significant amendment that Congress has made to the ISDEA since its inception reflects a desire to curtail [agency] authority to administer ISDEA contracts, and to expand tribes' and tribal organizations' authority to administer those contracts themselves." *Navajo Health Found. – Sage Mem'l Hosp. v. Burwell*, 2015 WL 1906107, at *51 (D.N.M. Apr. 9, 2015).

III. WHILE THE ACT'S GOVERNMENT CONTRACT LAW PROVISIONS ARE THE BASIS FOR CONTRACT ENFORCEMENT AND LIABILITY, PROCEDURAL AND REMEDIAL ISSUES LIKE EQUITABLE TOLLING SHOULD TAKE INTO ACCOUNT THE UNIQUE NATURE OF THESE CONTRACTS AND THEIR FEDERAL-TRIBAL RELATIONSHIP UNDERPINNINGS

A. Despite The Amendments, Agency Resistance Persisted And Indian Health Service Contract Support Cost Funding Shortfalls Skyrocketed To Over $100,000,000

The Indian Health Service's contract support cost policies from the mid-1990s were tepid efforts that fell well short of achieving full payment to all tribes, and as a consequence overall shortfalls steadily grew. *See, e.g.*, Indian Health Service Memorandum No. 92-2 (Feb. 27, 1992) (establishing a new designated Fund for new requests for contract support costs); Indian Health Service Circular No. 96-04 (Apr. 12, 1996), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main (formalizing policy that the Fund will be used on a "first come, first serve" queue basis).[3]

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[3] At least two courts quickly halted or invalidated the queue system. *Shoshone-Bannock Tribes v. Shalala*, 988 F.Supp. 1306 (D. Or. 1997), *aff'd on reconsideration*, 999 F.Supp. 1395 (D. Or. 1998); *California Rural Indian Health Bd. v. Shalala*, No. C-96-3526 (N.D. Cal. Aug. 25, 1998).

However, in response to the 1994 Amendments and "[b]eginning in fiscal year 1996, rapid growth in self-determination contracting activities, coupled with static appropriations for the IHS' Indian Self-Determination Fund and no increases for inflation, led to sharp increases in contract support shortfalls." NCAI, *Contract Support Costs Final Report*, at 32. By fiscal year 1997, the Indian Health Service's shortfall had reached over $35 million, $15 million of which was for existing contracts. Indian Health Service, Report to Congress on Contract Support Cost Funding in Indian Self-Determination Act Contracts, at 6-7 (May 1997), http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_-_1997_CSC_Report_to_Congress_Cost_Excalation.pdf.

In 1998, at Congress' direction, the discredited queue system was discontinued, H.R. Conf. Rep. No. 105-825, at 1233-1234 (1998), but its replacement system merely aligned underpayment ratios among contractors. *See* Indian Health Service, Circular No. 2000-01 (Jan. 20, 2000), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main; Indian Health Service, Circular No. 2001-5 (July 6, 2001), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main; Indian Health Service, Circular No. 2004-03 (Sept. 1, 2004), https://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_circ_main; www.ihs.gov/PublicInfo/Publications/IHSManual/Parts_index.cfm (2007). Neither system was designed to achieve, nor did either in fact achieve, full contract support cost payments due all tribes.

Congressional increases in Indian Health Service contract funding in fiscal years 1999, 2000 and 2001 deflected the situation temporarily. When the increases stopped, annual funding shortfalls more than doubled in four years. *See* Indian Health Service, Fiscal Year 2002 Contract Support Cost Funding Report ($40.4 million), http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_FY_2002_CSC_Shortfall_Report_-_FINAL_2001_data.pdf; Indian Health Service, Fiscal Year 2006 Contract Support Cost Funding Report ($90 million), http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support/IHS_FY_2006_CSC_Shortfall_Report_-_FINAL_2005_data.pdf. In fiscal year 2011, before this Court's *Ramah* decision, the shortfall was $118,476,505. Indian Health Service, 2012 Report to Congress on Funding Needs for Contract Support Costs of Self-Determination Awards (Based on Fiscal Year 2011 Data), http://www.ihs.gov/newsroom/index.cfm/reportstocongress/?yr=0, at 5.

B. This Court's Decisions In *Cherokee* And *Ramah* Relied On The Act's Government Contract Law Provisions To Determine Federal Liability For Contract Cost Payment

In the wake of the 1988 and 1994 Amendments, there followed widespread litigation by tribal contractors to enforce the contract support cost payment mandate. In addition to the claims of numerous

individual tribes, major cases included *Ramah*, a still-ongoing 1990 class action of all tribal contractors who had contracts with the Bureau of Indian Affairs. *See* Brief for Petitioner, at 12. Additional contract support cost class actions against the Indian Health Service were filed in federal district courts in *Cherokee Nation v. United States*, No. 6:99-cv-0092 (E.D. Okla. filed Mar. 5, 1999), and *Pueblo of Zuni v. United States*, No. 1:01-cv-01046 (D.N.M. filed Sept. 10, 2001). As Petitioner explains, class certification was sought but ultimately denied in these two cases. *See* Brief for Petitioner, at 13-18.

Meanwhile, the Cherokee Nation's and its co-plaintiff's separate administrative claims reached this Court in *Cherokee*, which overturned lower court decisions and conclusively established federal liability for unpaid Indian Health Service contract support cost amounts. The Court in *Cherokee* acknowledged the Act's express full payment mandate, *Cherokee*, 543 U.S. at 634, *citing* 25 U.S.C. §§ 450j-1(a), and the Court reasoned that the government contract law provisions incorporated into the Act serve to enforce that mandate. "[T]he Act says that if the Government refuses to pay, then contractors are entitled to 'money damages' in accordance with the Contract Disputes Act." *Cherokee*, 543 U.S. at 639, *citing, inter alia*, 25 U.S.C. §§ 450m-1(a), 450m-1(d). *Ramah* expressly reaffirmed *Cherokee* on this central point. *Ramah*, 132 S.Ct. at 2189 (*Cherokee* held that "the Government was obligated to pay the Tribes' contract support costs in full [and this conclusion] followed

directly from well-established principles of Government contracting law.").

C. Self-Determination Act Contract Claim Procedural And Remedial Issues Should Take Into Account The Act's And The Contracts' Unique Protections Based On The Federal-Tribal Relationship

As discussed *supra*, the Indian Self-Determination Act, 25 U.S.C. § 450m-1(d), specifically incorporates the Contract Disputes Act, which since 1994 has imposed a six-year statute of limitations on claims presented to agencies, *see* 41 U.S.C. § 7103. Following its earlier decision in this case, *Menominee Indian Tribe v. United States*, 614 F.3d 519 (D.C. Cir. 2010), the Court of Appeals below reasoned that this limitations statute is subject to equitable tolling, but then concluded that equitable tolling did not apply to the Tribe's claims. *Menominee Indian Tribe v. United States*, 764 F.3d 51 (D.C. Cir. 2014). In reaching this conclusion, the Court of Appeals refused to consider, inter alia, the federal-tribal relationship as a factor relevant in the equitable tolling calculus. 764 F.3d at 62. This refusal is directly contrary to the Act's intent, as recognized by the Court of Appeals for the Federal Circuit on this point in *Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d at 1297-1298.

Under the equitable tolling doctrine, courts may modify statutory time limits for appropriate equitable relief. *Irwin v. Department of Veterans Affairs*, 498

U.S. 89, 96 (1990). The federal judiciary is empowered and particularly obligated to take into account equity principles under federal law when faced with determining procedural and remedial issues related to federally-created rights, such as those at stake under the Indian Self-Determination Act. *Johnson v. Railway Express Agency*, 421 U.S. 454, 470 (1975). Generally, a litigant seeking equitable tolling must prove: (1) that he has been pursuing his rights diligently; and, (2) that some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citation omitted). As is customary, judicial exercise of equitable powers is to be guided by flexibility, the facts and circumstances of each case, and justice. *Id.* at 649-650.

The Court of Appeals in *Arctic Slope Native Ass'n v. Sebelius* correctly determined that the unique federal-tribal relationship, as rooted in the Self-Determination Act, properly rises to the level of an appropriate equitable tolling analysis factor.

> The Supreme Court and Congress have repeatedly recognized the special relationship between the government and Indian tribes. *E.g., United States v. Mitchell*, 463 U.S. 206, 225 (1983); 25 U.S.C. § 450a(b) (reaffirming the federal government's "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole"). Consequently, we must judge the government's conduct with the Indian tribes by "the most exacting fiduciary standards." *Seminole Nation v. United States*,

> 316 U.S. 286, 297 (1942). This special relationship is especially crucial under the ISDA, which Congress passed to facilitate and promote economic growth and development amongst the Indian tribes. *See generally* S. Rep. No. 100-274, at 4-7 (1987) (detailing federal policies encouraging Indian self-determination and tribal economic development). The Select Committee on Indian Affairs recognized that self-determination contracts supporting local government services on Indian lands were "essential to the success of Indian economic development efforts." *Id.* at 7. Although not dispositive, the existence of the special relationship between the government and Indian tribes supports our holding.

699 F.3d at 1297-1298 (citations in original). The Federal Circuit appropriately understood the import of the federal-tribal relationship in the Act and its implementation history. The Act itself is an exceptional pronouncement of the historic and unique relationship.

> There is no other example of a Secretary being required to transfer resources to assist another governmental entity and simultaneously to divest itself of its own resources. The Committee [also] recognizes that the uniqueness of this Act has made its implementation a complex process for both the tribes and the Federal agencies.

S. Rep. No. 100-274, at 6.

A court's application of equitable tolling principles in the context of Self-Determination Act contracts must therefore take into account the unique framework in which these *sui generis* contracts arise, a framework which stands considerably apart from routine government contract law. A ruling that the existence of the federal-tribal relationship is an appropriate factor to assess in Self-Determination Act contract cases applying equitable tolling is well-supported by Congress' exhaustive 1988 and 1994 measures to protect and enhance tribal contractor rights against the agencies, particularly when, as this Court noted in *Ramah*, the Act "is [to be] construed in favor of tribes. . . ." 132 S.Ct. at 2193.

As *Cherokee* and *Ramah* hold, the Act's government contract law protections provide a basis for contract enforcement and to remedy contract underpayments. But that enforcement scheme is complimentary to the Act's many other enforcement and remedial provisions, all of which are unique to tribal contracting activities under the Act. Those additional and powerful measures reflect Congress' special solicitude for Indian tribes and are expressions of the unique federal-tribal relationship. In this respect, the unique federal-tribal relationship in the Self-Determination Act and contracts under the Act is not unlike other instances of special congressional protection which this Court has recognized justify the application of equitable tolling principles. *E.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (the long-standing solicitude of Congress

for veterans as reflected in special veterans benefits claims statutory review and adjudication scheme supports equitable tolling).

As the dissent stated in *Arctic Slope Native Ass'n v. Department of Health and Human Serv.*, 11-2 B.C.A. ¶ 34,778 (C.B.C.A. 2011), "Congress and the courts have been at least as solicitous of the Indians as they have been of veterans and Social Security beneficiaries, and the same reasoning should apply to the administrative scheme set out in the ISDA." *Arctic Slope Native Ass'n v. Department of Health and Human Serv.*, 11-2 B.C.A. ¶ 34,778 (Steel, B.J., dissenting), *rev'd, Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012). This Court's recognition in *Cherokee* and *Ramah* that Congress has afforded tribes standard government contract law protections to enforce Self-Determination Act contracts sets a floor, but not a ceiling, on tribes' statutory rights under these unique contracts. Just as Congress has enacted special measures reflecting its "solicit[ude]" for tribal rights under the Act, so, too, should the courts be particularly solicitous of Indian tribes when applying equitable tolling principles in cases arising under the Act.

CONCLUSION

The decision of the Court of Appeals should be reversed, and this Court should hold that the equitable tolling analysis in Indian Self-Determination Act

claims by tribal contractors should take into account the unique relationship between the United States and Indian tribes.

Dated this 9th day of September, 2015.

Respectfully submitted,

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